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The "Ave Maria" Effect

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THE “AVE MARIA” EFFECT

FREDERICK B. JONASSEN*

“[N]othing in the First Amendment converts our public schools into religion-free zones or requires all religious expression to be left at the schoolhouse door.”¹

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1. Memorandum on Religious Expression in Public Schools, PUB. PAPERS 1053 (July 12, 1995).

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I. INTRODUCTION

Most everyone is familiar with the concept of “zero-tolerance” as it has been applied in public schools by administrators and teachers determined to render their schools free of illicit drugs, weapons, or harassing behavior. The 1980s and 1990s cultural stew of the Columbine massacre, the war on drugs, the “broken window” theory of law enforcement, the Gun Free Schools Act of 1994, and other influences conspired to one extent or another to generate the policy.² A zero-tolerance policy is an assignment of “explicit, predetermined punishments to specific violations of school rules, regardless of the situation or context of the behavior.”³ Punishments for minor infractions include suspension or expulsion from school.⁴ The policy has the benefit of bright lines and certain punishment to discourage violations of any kind—at least theoretically. But, worthy as this purpose may be, too often the general public becomes aware of zero-tolerance through news articles exposing harshly inflexible punishments for trivial violations in which the definitions of weapons and drugs have been extended beyond all reason.

There is the story of the nine-year-old who was suspended from school for drug possession and distribution because he shared Certs Breath Mints with classmates.⁵ Another child was suspended for weapons possession when he “formed his

2. On the influence of Columbine, see Celeste Headlee, *15 Years after Columbine, Are Schools Any Safer?*, NAT'L PUB. RADIO (Apr. 18, 2014), <http://www.npr.org/2014/04/18/304526475/15-years-after-columbine-are-schools-any-safer>; on the war on drugs, see Stephanie Francis Ward, *Schools Start to Rethink Zero-Tolerance Policies*, A.B.A. (Aug. 2014), http://www.abajournal.com/magazine/article/schools_start_to_rethink_zero_tolerance_policies/; on the “broken windows” theory of law enforcement, see generally Brian N. Moore, *Tolerating Zero Tolerance?*, SCH. BUS. AFF. 8 (Oct. 2010), <http://files.eric.ed.gov/fulltext/EJ914665.pdf>; and on the Gun Free Schools Act of 1994, 20 U.S.C. §§ 8921–23 (repealed 2002), see Russell J. Skiba, *The Failure of Zero Tolerance*, 22 RECLAIMING CHILD. & YOUTH 27, 28 (2014), and Kathleen M. Cerrone, Comment, *The Gun-Free Schools Act of 1994: Zero Tolerance Takes Aim at Procedural Due Process*, 20 PACE L. REV. 131 (1999).

3. Christopher Boccanfuso & Megan Kuhfeld, *Multiple Responses, Promising Results: Evidence-Based, Nonpunitive Alternatives to Zero Tolerance*, CHILD TRENDS 1 (Mar. 2011), <http://www.nea.org/assets/docs/alternatives-to-zero-tolerance.pdf>.

4. *Id.*

5. Dan Eggen, *Boy Brought up on a Candy Rap*, WASH. POST (Sept. 23, 1997), https://www.washingtonpost.com/archive/local/1997/09/23/boy-brought-up-on-a-candy-rap/9f9054fb-afe1-4547-af8e-c0fbbb8fac92/?utm_term=.394445ae1cd3 (discussing incident in which a nine-year-old student was suspended after bringing Certs to school and allegedly telling another student the candy would make him “jump higher”).

hand into the shape of a gun and pointed his finger 'execution-style' at a classmate[.]”⁶ Yet another incident concerned a seven-year-old who was suspended for chewing a pop-tart into the shape of a pistol.⁷ And the game of tag was banned from a school because it involved too much touching.⁸ As early as 1999, *USA Today* reported that students were removed from school for possessing

Midol, Tylenol, Alka Seltzer, cough drops and Scope mouthwash—contraband that violates zero-tolerance, anti-drug policies. Students have been expelled for Halloween costumes that included paper swords and fake spiked knuckles, as well as for possessing rubber bands, slingshots and toy guns—all violations of anti-weapons policies.⁹

These examples could easily be multiplied. There is no evidence that the policy has decreased violence and drug use in schools,¹⁰ but there is evidence that it has damaged trust between students and teachers,¹¹ has been applied disproportionately to minorities,¹² and has created a school to prison pipeline.¹³ Of course, the unreasonable implementation of this policy has also led to withering criticism and much re-evaluation.¹⁴

6. Patrick Jonsson, *Ohio Boy Suspended for Pointing Finger Like a Gun. 'Zero-Tolerance' Run Amok?*, CHRISTIAN SCI. MONITOR (Mar. 4, 2014), <https://www.csmonitor.com/USA/Education/2014/0304/Ohio-boy-suspended-for-pointing-finger-like-a-gun.-Zero-tolerance-run-amok>.

7. Melissa Locker, *WATCH: Boy Suspended from School for Making "Gun" out of a Pop-Tart*, TIME (Mar. 4, 2013), <http://newsfeed.time.com/2013/03/04/watch-boy-suspended-from-school-for-making-gun-out-of-a-pop-tart/>.

8. Scott Timberg, *Zero-Tolerance Madness: A "No Touching" Rule Means Even Tag Is Out-of-Bounds for Seattle-Area School Kids*, SALON (Sept. 25, 2015), http://www.salon.com/2015/09/25/zero_tolerance_madness_a_no_touching_rule_means_even_tag_is_out_of_bounds_for_seattle_area_school_kids/.

9. Dennis Cauchon, *Zero-Tolerance Policies Lack Flexibility*, U.S.A. TODAY (Apr. 13, 1999), <http://usatoday30.usatoday.com/educate/ednews3.htm>.

10. Skiba, *supra* note 2, at 30 (“No data exist to show that out-of-school suspensions and expulsions reduce disruption or improve school climate. If anything, disciplinary removal appears to have negative effects on student outcomes and the learning climate. . . . It is difficult to argue that zero tolerance approaches are necessary in order to safeguard an orderly and effective learning climate when schools that use school exclusion more have poorer academic outcomes.”).

11. Boccanfuso & Kuhfeld, *supra* note 3, at 2 (“Students who trust their teachers, and feel that their teachers are respectful, fair, and attentive, are more likely to form bonds with and perform well in school. By restricting the ability of school staff to put student actions into context in some cases, zero tolerance policies can inhibit the formation of school bonds.” (footnotes omitted)).

12. Stephen Hoffman, *Zero Benefit: Estimating the Effect of Zero Tolerance Discipline Policies on Racial Disparities in School Discipline*, 28 EDUC. POL’Y 69, 90 (2014) (“[Z]ero tolerance policies have an especially harsh impact on Black students, exacerbating already severe disparities in school discipline between Black students and White students.”).

13. AM. PSYCHOLOGICAL ASSOC. ZERO TOLERANCE TASK FORCE, *Are Zero Tolerance Policies Effective in the Schools?: An Evidentiary Review and Recommendations*, 63 AM. PSYCHOLOGIST 852, 856 (2008) (“The increased reliance on more severe consequences in response to student disruption has . . . resulted in an increase of referrals to the juvenile justice system for infractions that were once handled in school. The term *school-to-prison pipeline* has emerged from the study of this phenomenon.” (citations omitted) (original emphasis)).

14. See, e.g., John Cloud, *The Columbine Effect*, TIME (Nov. 28, 1999), <http://content.time.com/time/magazine/article/0,9171,35098,00.html>; Ward, *supra* note 2; AM. PSYCHOLOGICAL ASSOC. ZERO TOLERANCE TASK FORCE, *supra* note 13.

If school administrators are able to crack down on Certs Breath Mints and paper firearms, it should surprise no one that they may implement a zero-tolerance policy toward religious expression, one that unreasonably and intolerantly prohibits any speech that touches on religion. One could certainly devote a law review article to an examination of the many cases in which students have been denied religious expression in public schools: the first grader whose poster expressing thanks for Jesus was the only one his school would not display because of its religious content;¹⁵ the school district that discontinued recitation of a Mohawk Thanksgiving address over the public address system because some believed it could be a Native American prayer;¹⁶ the Montana valedictorian who was not permitted a brief mention of her religious belief in God and Christ at a graduation ceremony;¹⁷ the cheerleaders who were not permitted to carry banners and run-throughs containing Bible verses at football games;¹⁸ and a football coach (concededly not an instance of student speech) who was fired for praying by himself after football games.¹⁹

Then there is the case of “Ave Maria,” which will serve as the exclusive focus of this Article. In this case, *Nurre v. Whitehead*, the Everett School District in Washington State prohibited the seniors of the Jackson High School Wind Ensemble from

15. *C.H. ex rel. Z.H. v. Oliva*, 226 F.3d 198 (3d Cir. 2000). The student made the poster in response to an assignment asking the students “to make posters depicting what they were ‘thankful for.’” *Id.* at 201. The poster was at first displayed with the others, but then removed, and finally placed in a less prominent spot. *Id.* The Third Circuit remanded the case with instructions to dismiss on what the dissent characterized as “a spurious procedural ground never raised by the defendants—viz., that the complaint does not adequately allege facts providing a basis for holding any of the defendants responsible for the treatment of the poster.” *Id.* at 203 (Alito, J., dissenting).

16. *Jock v. Ransom*, No. 7:05-cv-1108, 2007 WL 1879717 (N.D.N.Y. June 28, 2007), *aff’d*, No. 07-3162-CV, 2009 WL 742193 (2d Cir. Mar. 20, 2009). Originally, the school district allowed the OHEN:TON KARIHWATEHKWEN or Mohawk Thanksgiving Address to be played over the public address system “for the pedagogical purpose of exposing District students to Mohawk language and culture.” *Id.* at *6. A non-Mohawk student’s parents complained that the recitation of the Address was a prayer. *Id.* at *1. Following the advice of counsel, the school district removed the Address from the public-address system. *Id.* The parents of Mohawk students filed a complaint that the action violated their equal protection rights. *Id.* at *2. Confronted with conflicting evidence as to the nature of the Address, the court concluded that the actions of the school district were at least reasonable. *Id.* at *12.

17. *Griffith v. Butte Sch. Dist.* No. 1, 244 P.3d 321, 333 (Mont. 2010) (finding that school district violated student’s free speech rights by prohibiting her from mentioning her religious beliefs: “We find it unreasonable for the School District to conclude that Griffith’s cursory references to her personal religious beliefs could be viewed by those in attendance at the BHS graduation ceremony as a religious endorsement by the School District.”).

18. *Matthews v. Kountze Indep. Sch. Dist.*, No. 53526, 2013 WL 1914796 (356th Judicial Dist. Tex. May 8, 2013) (“Neither the Establishment Clause nor any other law prohibits the cheerleaders from using religious-themed banners at school sporting events. Neither the Establishment Clause nor any other law requires Kountze I.S.D. to prohibit the inclusion of religious-themed banners at school sporting events.”), *aff’d in part, rev’d in part* 482 S.W.3d 120 (Tex. App. 2014) (holding that the case had been rendered moot by the school district’s change of policy permitting the banners and run-throughs), *rev’d* 484 S.W.3d 416 (Tex. 2016) (holding case is not moot and remanding for further proceedings).

19. Brief of Appellant at 4, *Kennedy v. Bremerton Sch. Dist.*, No. 16-35801, 2016 WL 6611220 (9th Cir. Oct. 31, 2016) (“Specifically, after the game is over, and after the players and coaches from both teams have met to shake hands at midfield, Coach Kennedy feels called to pause on the playing field to engage in private religious expression. He takes a knee at the 50-yard line and offers a silent or quiet prayer of thanksgiving for player safety, sportsmanship, and spirited competition. That prayer lasts no more than 30 seconds.”(citations omitted)).

performing an instrumental piece of music they had chosen to play for their graduation ceremony.²⁰ The reason for the prohibition was the sectarian title of the chosen work, "Ave Maria."²¹ The district and appellate courts produced opinions ruling in favor of the school, prompting a concurrence by Judge Milan D. Smith disagreeing with the constitutional reasoning of the majority,²² and a dissent by Justice Samuel A. Alito to the Supreme Court's denial of certiorari.²³ Even after finding that instrumental music is constitutionally protected speech, and after ostensibly assuming that the performance of the Wind Ensemble was a limited public forum, the lower courts found it reasonable to ban the work from commencement because of the possibility that the appearance of its title in the graduation program could either create an Establishment Clause violation or engender controversy.²⁴

The case is almost ten years old now. It has provoked some, but not a great deal, of critical commentary.²⁵ Nevertheless, there are some things about it that stand out. *Nurre* is not like the cases of religious expression mentioned above. In those cases—with the possible exception of the Mohawk case—the messages or prayers were intentionally religious. The *Nurre* case is different in that the students who wished to perform "Ave Maria" quite credibly intended no religious message at all and would not likely have been understood by their audience to be expressing one. Their interest in the music was artistic, not religious. On the other hand, that very aspect of *Nurre* makes the case comparable to the instances of zero-tolerance regarding drugs and weapons cited above.²⁶ In those cases of zero-tolerance, school authorities punished students for behavior that obviously had nothing to do with the reasons for which the policy was implemented: the students in those cases had no intention of taking illicit drugs or carrying dangerous weapons, and were not in possession of anything illicit or dangerous. In the "Ave Maria" case, the authorities prohibited student expression which similarly possessed no intention of conveying a religious message, and which was simply not religious. Just as zero-tolerance sweeps up harmless behavior, irrelevant to the purposes of the policy, and imposes harsh punishment, the school administrators of Jackson High, in their zeal to avoid offending the Establishment Clause, unreasonably banned a beautiful work of musical art, which the Jackson High seniors wanted to play at their graduation. But unlike zero-tolerance for the performance of "Ave Maria," zero tolerance for student consumption of Alka Selzer does not implicate the constitutional right of Free Speech.

20. *Nurre v. Whitehead*, 520 F. Supp. 2d 1222, 1225 (W.D. Wash. 2007), *aff'd* 580 F.3d 1087, 1091 (9th Cir. 2009), *cert. denied* 559 U.S. 1025 (2010).

21. *Nurre*, 520 F. Supp. 2d at 1225; *Nurre*, 580 F.3d at 1091.

22. *Nurre*, 580 F.3d at 1099 (Smith, J., dissenting in part, but concurring in the judgment).

23. *Nurre*, 559 U.S. at 1025 (Alito, J., dissenting from denial of certiorari).

24. *Nurre*, 580 F.3d at 1095; *Nurre*, 520 F. Supp. 2d at 1238.

25. See, e.g., CATHERINE J. ROSS, LESSONS IN CENSORSHIP: HOW SCHOOLS AND COURTS SUBVERT STUDENTS' FIRST AMENDMENT RIGHTS 265–67 (2015); William M. Perrine, *Religious Music and Free Speech: Philosophical Issues in Nurre v. Whitehead*, 21 PHIL. MUSIC EDUC. REV. 178 *passim* (2013); Matthew J. Shechtman, *Piercing Pearson: Is Qualified Immunity Curbing Students' Free Speech Rights?*, 43 STETSON L. REV. 17 *passim* (2013); Charles J. Russo, *Tone Deaf? The Courts Turn a Deaf Ear to Religious Music in Schools*, 257 EDUC. L. REP. 1 *passim* (2010); Frederick B. Jonassen, *Free Speech and Establishment Clause Rights at Public School Graduations Ceremonies: A Disclaimer: The Preceding Speech Was Government Censored and Does Not Represent the Views of the Valedictorian*, 55 WAYNE L. REV. 683, 766–76 (2009).

26. See *supra* notes 3–14.

The title of this Article, “The ‘Ave Maria’ Effect,” is not intended to suggest a discussion of religious expression *per se*. Rather, it is meant to signify a narrowing of permissible student expression due to unreasonable fear of Establishment Clause litigation created by the courts. By allowing the prohibition of an instrumental piece of music at graduation because of its name, without deciding whether this could have been a genuine Establishment Clause violation, the courts have, in effect, decided that school administrators may implement a zero-tolerance policy at school events towards any expression having a scintilla of religion about it. Moreover, the precedent has left school administrators with the incentive to do just that in order to avoid any imaginable violation of the Establishment Clause or any criticism from members of the community no matter how extreme and hostile to religion that criticism may be. Finally, the Ninth Circuit opinion permits this prohibition to be extended not only to anything suggestive of religious speech, but also to any speech that, in the view of school officials, may be controversial,²⁷ a proposition that could potentially suppress far more than religious expression.

Following this introduction, Section II of this Article will present the facts of *Nurre*. Section III will outline the reasoning of the opinions of the district court, the appeals court, and the opinions of Judge Smith and Justice Alito. This part of the Article is by far the most lengthy in tracing the tortuous and dubious reasoning of the district and appellate courts in reaching conclusions that deferred so completely to school authorities. Section IV will concern the Oral Argument before the Ninth Circuit. And Section V will discuss the Amici Curiae Briefs. A pessimistic Conclusion will follow.

II. THE FACTS OF NURRE V. WHITEHEAD

In the spring of 2006, the plaintiff, Kathryn Nurre, was a senior member of the Wind Ensemble of Jackson High School, located in Everett, Washington.²⁸ As in previous years, the Wind Ensemble was to perform a musical piece at the school’s graduation ceremony.²⁹ In 2002, when Leslie Moffat replaced Jim Rice as the Faculty Director of the Wind Ensemble, the senior members told Moffat that Rice had allowed the seniors to select the music they would perform at graduation.³⁰ Rice, however, “testified that he ‘always selected the piece the band played [and] [t]he graduating seniors had no input in that selection.’”³¹

27. *Nurre*, 580 F.3d at 1094–95 (citing precedent that ostensibly found “that a [School] District’s concern regarding disruption and controversy were legitimate reasons for restricting content . . . [and] recognized that a school acts reasonably when it takes steps to avoid controversy or maintain an appearance of neutrality[.]” and concluding, “Here, the District was acting to avoid a repeat of the 2005 controversy by prohibiting any reference to religion at its graduation ceremonies.”).

28. *Nurre v. Whitehead*, 520 F. Supp. 2d 1222, 1225 (W.D. Wash. 2007).

29. *Id.*

30. Defendant’s Motion for Summary Judgment, *Nurre v. Whitehead*, 520 F. Supp. 2d 1222 (W.D. Wash. 2007) (No. C06-0901RSL), 2007 WL 4868967 (“Lesley Moffat replaced Rice during the Summer of 2002, which was Nurre’s freshman year. Moffat was told by the students that seniors had a ‘tradition’ of selecting the final piece to play at commencement.” (citations omitted)).

31. Defendant’s Response to Plaintiff’s Cross-Motion for Summary Judgment at 2, *Nurre*, 520 F. Supp. 2d 1222 (No. C06-0901RSL) (citing Dkt. 13 ¶12).

Moffat relied on what the seniors told her and allowed them to choose the piece they would perform at graduation for three years (2003–05).³² For each of these years, the seniors chose to perform "On a Hymnsong of Phillip Bliss," by David R. Holsinger, a piece that Rice had earlier selected for the Wind Ensemble to perform at graduation during his tenure as Director.³³ In 2006, however, the seniors "wanted to start [their] own tradition by playing a different song."³⁴ They unanimously chose to play Franz Biebl's "Ave Maria," a piece that they had performed at the school winter concert earlier in the school year, the title appearing without controversy in the concert program.³⁵ Nurre testified, "Religion didn't even come into our minds at all[.]"³⁶ "The other seniors and I did not choose the 'Ave Maria' piece because of any religious message it might convey. Rather, the seniors chose it because of its beauty, we liked how it sounded and the performance would have made our graduation a memorable one."³⁷

Moffat sent a copy of the music to the Principal of Jackson High, Terry Cheshire, and to the Everett School District's Associate Superintendent, Karst Brandsma, with a note indicating that the words were not to be sung.³⁸ Cheshire recognized that the selection might be a problem because of complaints regarding the Jackson High School Choir's performance of a choral piece, "Up Above My Head," at the 2005 graduation.³⁹ That was Cheshire's first year as principal.⁴⁰ At that time, he was unaware that in approving music for graduation, he had the responsibility of reviewing not only the titles of the musical pieces, but also their content.⁴¹ Because

32. Defendant's Motion for Summary Judgment, *supra* note 30. ("Having no knowledge of Mr. Rice's practice of personally selecting the graduation piece without student input, Moffat permitted students to select the music to be performed." (citations omitted)).

33. *Nurre*, 520 F. Supp. 2d at 1225.

34. Plaintiff Nurre's Motion for Summary Judgment at 2, *Nurre*, 520 F. Supp. 2d 1222 (No. C06-901RSL).

35. *Nurre*, 1222 F. Supp. 2d at 1225.

36. Supplemental Declaration of Michael A. Patterson Re: Defendant's Motion for Summary Judgment, Exh. 2, Deposition Upon Oral Examination of Kathryn Nurre at 67, *Nurre*, 520 F. Supp. 2d 1222 (No. C06-0901RSL) [hereinafter Deposition Upon Oral Examination of Kathryn Nurre]; Plaintiff Nurre's Motion for Summary Judgment, *supra* note 34 ("Plaintiff and the other seniors did not choose the piece because of any religious message it might convey.").

37. Declaration of Kathryn Nurre in Support of Her Motion for Summary Judgment ¶¶ 17–18, *Nurre*, 520 F. Supp. 2d 1222 (No. C06-901RSL), 2007 WL 4868957; Plaintiff Nurre's Motion for Summary Judgment, *supra* note 34, at 3 (citing Nurre Dep. at 85); Declaration Of Michael A. Patterson Re: Defendant's Motion for Summary Judgment, Exh. 3, Deposition Upon Oral Examination of Lesley Moffat at 36, *Nurre*, 520 F. Supp. 2d 1222 (No. C06-0901RSL) [hereinafter Deposition Upon Oral Examination of Lesley Moffat] ("[The students] really liked the piece, and it's beautiful, and they said they wanted to play it because of that.").

38. Brief of Appellant at 5, *Nurre*, 580 F.3d 1087 (No. 07-35867) ("Moffat sent copies of the music that was to be performed to Terry Cheshire, Principal of JHS, and Karst Brandsma, the District's Associate Superintendent for Instruction. A note accompanying Moffat's submission stated that the senior members chose 'Ave Maria' for their piece to play during the ceremony. She also sent the musical score for the piece; at the top, Moffat wrote in bold 'Not sung,' indicating there would be no vocal parts or lyrics." (citations omitted)).

39. *Nurre*, 580 F.3d at 1091.

40. Defendant's Motion for Summary Judgment, *supra* note 30.

41. *Id.* ("Jackson's principal, Terry Cheshire, had just begun his tenure at Jackson and was unaware that it was his responsibility to review not only the titles of the music, but also the content to ensure compliance with District policy." (citations omitted)).

Cheshire did not perceive any religious content from the title of “Up Above My Head,” he approved it without examining its lyrics, so that Everett School District officials were not aware of the religious content of this piece.⁴² The Superintendent of the Everett School District, Carol Whitehead, testified that members of the audience complained to her about “Christian” lyrics in the song, such as, “over our heads, Jesus reigns.”⁴³ Brandsma testified that complaints were sent to the editor of *The Herald*, the largest newspaper in Snohomish County.⁴⁴ However, the only complaint that was documented in the litigation was a single letter appearing in *The Herald*.⁴⁵

Religious song had no place at event

This letter is regarding Henry M. Jackson High School’s graduation at the Everett Events Center, which is, as I understand it, a public venue.

I would like to express my puzzlement over how the Everett School District – including a school board member, superintendent, south area executive director, principal and choir director – can justify classroom civics instruction on the importance of our national and state constitutions specifically relating to policy regarding religious activity, while willfully disregarding the same by sponsorship of nonsecular entertainment during a public graduation ceremony. (The program’s song title of “Up Above My Head” gave no indication the words sung would be of a religious nature.)

Is that the final lesson of our students’ education? If in fact the lesson was to demonstrate the meaning of hypocrisy, an “A” grade should be awarded. Finally, does putting the violation to music somehow mitigate

42. *Id.* (“Because the title to the song ‘Up Above My Head’ appeared secular, Cheshire approved it.” (citations omitted)).

43. Declaration of Michael A. Patterson Re: Defendant’s Motion for Summary Judgment, Exh. 2, Deposition Upon Oral Examination of Dr. Carol Whitehead at 60–61, *Nurre*, 520 F. Supp. 2d 1222 (No. C06-0901RSL) [hereinafter Deposition Upon Oral Examination of Dr. Carol Whitehead].

Q. What about the songs [were] Christian?

A. At the 2005 on the program the principal had reviewed the titles with the teachers and the title was something like – I would have to see it exactly to make sure I’m quoting this correctly – but something like up over my head or up over our head, and so he took the recommendation from the teacher that reviewed the title. But when the song was sung, the lyrics were something like up over my head Jesus reigns, and so it was clearly a song of a Christian nature.

44. Defendant’s Motion for Summary Judgment, *supra* note 30 (“[S]ome [people in the audience] sent complaints to the editor of the Snohomish County’s largest newspaper.” (citations omitted)). (The district court opinion refers to Associate Superintendent Brandsma as “Ms.” However, the deposition makes clear that Karst Brandsma is a “Mr.” See Declaration of Michael A. Patterson Re: Defendant’s Motion for Summary Judgment, *supra* note 37, at 20, 31, 42).

45. Petition for Writ of Certiorari, at 6–7, *Nurre*, 559 U.S. 1025 (No. 09-671) (“School officials stated during deposition that they received complaints about the religious nature of ‘Up Above My Head,’ but the *only* specifically documented complaint about the earlier 2005 graduation that Respondent admitted to the record was a single letter to the editor of the local paper mocking the educational competence of the Superintendent and her subordinates[.]” (emphasis in original)).

the offense? Under no circumstance should this letter be construed as a criticism of the very talented performing students!⁴⁶

Although Whitehead described the song's lyrics as Christian, claiming they referred specifically to Jesus Christ, the source Ms. Whitehead cited, the Kirk Franklin lyrics, does not have any specifically Christian references, though it does mention "God" repeatedly.⁴⁷

Up above my head I hear music in the air

Up above my head there's a melody so bright

And fair

I can hear when I'm all alone

Even in those times when I feel all hope is gone

Up above my head I hear joybells ringing

Up above my head I hear angels singing

There must be a God somewhere

There must be a God somewhere

I hear music in the air

I hear music everywhere

There must be a God somewhere

There must be a God somewhere

There must be a God somewhere

*There must be a God somewhere*⁴⁸

After the 2005 controversy, Mr. Cheshire was instructed to review all musical selections for content as well as title, especially in the context of commencement exercises.⁴⁹ But as Moffat indicated, no words were to be sung in the wind ensemble's performance of "Ave Maria,"⁵⁰ so, unlike "Up Above My Head," the instrumental music to be performed had no explicit religious content, except for its title.

46. Declaration of Michael A. Patterson re: Defendant's Motion for Summary Judgment, Exh. 4, Letter to the Editor of the Everett *Herald* published June 26, 2005, *Nurre*, 520 F. Supp. 2d 1222 (No. C06-0901RSL).

47. The Defendant references these lyrics in Appellee's Answering Brief, at 5, *Nurre*, 580 F.3d 1087 (No. 07-35967) (citing KIRK FRANKLIN Lyrics-UP ABOVE MY HEAD, that may be found at <http://www.azlyrics.com/lyrics/kirkfranklin/upabovemyhead.html>).

48. Petition for Writ of Certiorari, *supra* note 45, at 6, n.3.

49. Defendant's Motion for Summary Judgment, *supra* note 30.

50. Brief of Appellant, *supra* note 38.

Cheshire informed the School District's Executive Director of Instruction and Curriculum, Lynn Evans, about his concerns that "Ave Maria" might not be consistent with the District's policy in the light of the controversy of the previous year.⁵¹ Evans brought the matter to Brandsma, who agreed with Evans and Cheshire that "Ave Maria" should not be played at the graduation.⁵² When Whitehead learned of the matter, she called a meeting with Brandsma and Evans to discuss the Wind Ensemble's selection of "Ave Maria."⁵³ At the meeting, it was decided that the performance would not be permitted at the graduation ceremony.⁵⁴ As Whitehead testified, "[W]e made the decision that because the title of the piece would be on that program and it's Ave Maria and that many people would see that as religious in nature, that we would ask the band to select something different."⁵⁵ It appears that no one at the meeting clearly understood the meaning of the words, "Ave Maria."⁵⁶ Whitehead testified that she did not understand their meaning.⁵⁷ In her deposition, Nurre demonstrated she did not understand the meaning of the words either.⁵⁸ The decision was made without any input or attempt to receive input from the students.⁵⁹

After the meeting, Brandsma sent an email to the high school principals of the District in which he requested that the principals provide a copy of the musical selections that would be performed including any lyrics that would be sung.⁶⁰ Brandsma noted that School Policy 2340 and Procedure 2340P allowed musical presentations with religious themes as long as the selections were based on their artistic and educational value and are accompanied by comparable non-religious works.⁶¹ However, Brandsma mandated that

51. Defendant's Motion for Summary Judgment, *supra* note 30.

52. *Id.*

53. Nurre v. Whitehead, 520 F. Supp. 2d 1222, 1225 (W.D. Wash. 2007).

54. Deposition Upon Oral Examination of Dr. Carol Whitehead, *supra* note 43, at 77.

55. *Id.* at 76–77.

56. "[Whitehead's] sole concern and that of the persons attending the meeting was the listing of the two-word title of the piece, although no one at the meeting knew what the words 'Ave Maria' meant, other than that they thought it had a religious connotation." Plaintiff Nurre's Motion for Summary Judgment, *supra* note 34, at 4 (citations omitted).

57. Petition for Writ of Certiorari, *supra* note 45, at 18 (citing Excerpts from the Record on Appeal (hereinafter ER 229) ("Superintendent Whitehead disclaimed knowing what the words *Ave Maria* even meant, though she viewed it as having a 'religious connotation.'").

58. Deposition Upon Oral Examination of Kathryn Nurre, *supra* note 36, at 35–36.

Q. Do you know what ["Ave Maria"] stands for?

A. I'm not sure. I know it's – I think it's Latin and it has to do with Mary, and it means like Holy Mary or something. I'm not sure.

59. Plaintiff Nurre's Motion for Summary Judgment, *supra* note 34, at 5 ("During their deliberations and discussions, neither the Defendant nor any of the school administrators ever allowed the students to give them input or additional information. They engaged in absolutely no dialogue with the students and conducted no genuine investigation into their selection of 'Ave Maria' or its origins.").

60. *Id.* at 4.

61. *Id.*

music selections for graduation be entirely secular in nature. My rationale is based on the nature of the event. It is a commencement program in celebration of senior students earning their high school diploma. It is not a music concert. Musical selections should add to the celebration and should not be a separate event. Invited guests of graduates are a captive audience. I understand that attendance is voluntary, but I believe that few students (and their invited guests) would want to miss the culminating event of their academic career. And lastly there is insufficient time at graduation to balance comparable artistic works.⁶²

Whitehead made a similar distinction between commencement ceremonies and other school programs in her deposition.

It’s my understanding that the commencement is a once in a lifetime opportunity for students and their families, that it should be a neutral experience so that every student and every family can feel comfortable coming there. Because based on what I understand about a Federal Supreme Court decision, it is not really an opportunity that would be voluntary in that should the student or their parents or other family members opt not to attend, they would never have another opportunity to get that back, which is very different than attending another assembly or attending another concert.⁶³

The Everett School District had a policy, Board Policy 2430P, in force at the time of this controversy, which provided rules for the performance of music with religious associations.⁶⁴ School Board Policy 2430P did not reflect the distinction which Mr. Brandsma and Ms. Whitehead drew between a high school graduation and other school programs.⁶⁵ The Policy read as follows:

Religious services, programs or assemblies shall not be conducted in school facilities during school hours or in connection with any school sponsored or school related activity. Speakers and/or programs that convey a religious or devotional message are prohibited. This restriction does not preclude the presentation of choral or musical assemblies, which may use religious music or literature as a part of the program or assembly.

Musical, artistic and dramatic presentations, which have a religious theme may be included in course work and programs on the basis of their particular artistic and educational value or traditional secular usage. They shall

62. *Id.* at 4–5 (emphasis in original).

63. Deposition Upon Oral Examination of Dr. Carol Whitehead, *supra* note 43, at 33–34.

64. Plaintiff Nurre’s Motion for Summary Judgment, *supra* note 34, at 10 (“This policy reflects the settled rule that it is not improper for public school music groups to perform music with religious themes.”).

65. *Id.* at 11 (“Defendant Whitehead has sought to justify the exclusion of ‘Ave Maria’ in this case on the grounds that commencement exercises are different and require that all musical performances be secular. However, the only school board policy governing music performances and religion is Policy 2340P, . . . and there is no separate school board policy that covers performances at commencement ceremonies. Therefore, school district policies do not treat music performances at commencement differently from other music performances.” (citations omitted)).

be presented in a neutral, non-devotional manner, be related to the objective of the instructional program, and be accompanied by comparable artistic works of a non-religious nature.⁶⁶

In his deposition testimony, Brandsma explained the School District's role in overseeing graduation.

Everett School District holds graduation ceremonies for all of its high schools at the Everett Events Center. Though the Everett School District does not own the Everett Events Center, it rents the facility and does sponsor and fund the graduation ceremony of each of its three comprehensive high schools . . . The Everett School District is responsible for the conduct and content of all speeches and performances that occur at these graduation ceremonies. . . . [A]nd the District maintains supervisory control over each aspect of the ceremony. Speeches are reviewed in advance to ensure they are compliant with District policies. Music is also reviewed. If any speech were inappropriate, such as containing language that was lewd, offensive, profane, or proselytizing (which is not meant to be an exhaustive list), the District would not allow it.⁶⁷

Consistent with this statement, the defendant claimed that the school administration sponsored the graduation in its entirety, used its funds to rent the facility where the graduation took place, planned the details of the ceremony, was fully responsible for all content and conduct that occurred, maintained supervisory control over all aspects of the event, and reviewed speeches and music in advance to be sure that they complied with school district policies.⁶⁸

As indicated above, the concern of the school officials was that the title of "Ave Maria" would appear in the graduation program and be recognized as religious.⁶⁹ After receiving Brandsma's email, Moffat spoke with Cheshire for clarification, and suggested that the program simply list the piece at issue as "A Selection by France [sic] Biebl," thus suppressing the sectarian title of the music.⁷⁰ But Cheshire told her, without other explanation, "[I]t would be unethical to inaccurately or untruthfully list the titles to pieces."⁷¹ Moffat then informed the Wind Ensemble

66. Complaint para. 15, *Nurre v. Whitehead*, 520 F. Supp. 2d 1222 (W.D. Wash. 2007) (No. C06-901RSL), 2006 WL 2302614.

67. Defendant's Response to Plaintiff's Cross-Motion for Summary Judgment, *supra* note 31.

68. Defendant's Motion for Summary Judgment, *supra* note 30.

69. See *supra* notes 54-55 and accompanying text.

70. Regarding this conversation between Mr. Cheshire and Ms. Moffat, Ms. Moffat testified.

A. I did ask for clarification as to why.

Q. And what did Mr. Cheshire say?

A. That--well, in the conversation, I said, "Could we change and just write 'A selection by France [sic] Biebl'?"

Deposition Upon Oral Examination of Lesley Moffat, *supra* note 37, at 40. In subsequent quotations of this conversation, the composer's first name, Franz, will be spelled correctly.

71. *Nurre v. Whitehead*, 520 F. Supp. 2d 1222, 1226 (W.D. Wash. 2007) (citing Dkt. # 12 (Cheshire Decl.) at ¶ 4). Ms. Moffat continued her testimony:

A. And then I was--that was where he said that that would not be, I believe the

that they needed to select a different piece of music to play at the graduation.⁷² Nurre and the other members of the Ensemble were upset by the decision.⁷³ Rather than boycott the commencement, they reluctantly decided to play the fourth movement of the "Holst Second Suite in F" which was performed at the graduation on June 17, 2006.⁷⁴ It was listed as Gustav Holst's "Second Suite for Military Band."⁷⁵ At the ceremony, Nurre and the other senior members of the Wind Ensemble received their diplomas.⁷⁶

Whitehead later testified that it would not have been "appropriate" to play "Ave Maria" without listing its title in the program.⁷⁷ However, several pieces played by the High School Jazz Combo at the beginning of the ceremony when attendees were taking their seats were not listed.⁷⁸ These pieces, however, were not "featured" as was the performance of the Wind Ensemble.⁷⁹ In any event, Whitehead indicated that she would have objected to "Ave Maria" even if it were not listed on the graduation program, "[b]ecause it is a religious piece."⁸⁰

The commencement ceremony included a variety of instrumental and vocal music, both student-performed and recorded.⁸¹ Aside from the Wind Ensemble's performance, the Jazz Combo played six separate instrumental works, "Freedom Jazz Dance," "Day by Day," "Let's Fall in Love," "Unforgettable," "Un Poco Loco," and "Travelling Light."⁸² Then the processional followed, an instrumental-only recording of "Pomp and Circumstance," which was also used for the recessional.⁸³ Once assembled, the "graduates stood to the 'National Anthem,' sung by Aubrey Logan of the Class of 2006."⁸⁴ After remarks by a class speaker, the school Choir performed "Mother Africa."⁸⁵

word "ethical." I'm not 100 percent sure, but on that line, would not be okay to do that.

* * *

Q. Did he state why it was unethical or wrong or whatever to have an alternate title?

A. No, I don't believe so.

Deposition Upon Oral Examination of Lesley Moffat, *supra* note 37, at 40-41.

72. Plaintiff Nurre's Motion for Summary Judgment, *supra* note 34, at 5.

73. Petition for Writ of Certiorari, *supra* note 45, at 10.

74. Plaintiff Nurre's Motion for Summary Judgment, *supra* note 34, at 6; *Nurre*, 520 F. Supp. 2d at 1226.

75. *Nurre*, 520 F. Supp. 2d at 1226.

76. Plaintiff Nurre's Motion for Summary Judgment, *supra* note 34, at 2.

77. Petition for Writ of Certiorari, *supra* note 45, at 8 (citing ER 225-26).

78. Plaintiff Nurre's Motion for Summary Judgment, *supra* note 34, at 4.

79. Brief in Opposition [to Petition for Certiorari], at *10-11, *Nurre v. Whitehead*, 559 U.S. 1025 (2010) (No. 09-671), 2010 WL 128006 ("Because the song ["Ave Maria"] was a featured piece as opposed to a prelude to the ceremony, the District concluded that it would be more appropriate to choose another song, rather than simply list the name of the piece in the program under a different title.").

80. Brief of Appellant, *supra* note 38, at 32 (citing ER 227).

81. Petition for Writ of Certiorari, *supra* note 45, at *10.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

On June 26, 2006, Nurre filed her complaint under 42 U.S.C. § 1983, alleging violations of the Free Speech Clause, the Establishment Clause of the First Amendment, and the Equal Protection Clause of the Fourteenth Amendment.⁸⁶

III. THE OPINIONS

The title of Biebl's work is certainly religious. "Ave Maria" is Latin for "Hail Mary," the Roman Catholic prayer to the Virgin Mary, the Mother of Jesus Christ.⁸⁷ Among the many musical settings for this prayer, perhaps the two best known are the version by Johann Sebastian Bach and Charles Gounod, and the version by Franz Schubert; but there are many others.⁸⁸ Comparatively speaking, the setting by Franz Biebl is obscure, composed as it was in 1964 for a German fire brigade choir engaged in a choral competition.⁸⁹ Today, it has some currency both performed with words and performed as an instrumental piece by various ensembles.⁹⁰

The question of whether the sectarian title of the piece could legally appear in a public school graduation program will be assessed later in this Article. However, that issue is something of a red herring. Moffat's suggestion that the piece be identified in the program as, "A Selection by Franz Biebl," not only indicated the lack of religious motive in presenting this work, but would also have avoided the problem school administrators had with the piece by excluding its title from the graduation program altogether.⁹¹ Whatever the validity of Cheshire's reason for rejecting the offer, another topic reserved for later treatment, the students clearly only wished to perform "Ave Maria" for artistic reasons. In fact, *Nurre v. Whitehead* is not a case about religious expression at all, but rather a case about artistic expression suppressed by an unreasonable fear of violating the Establishment Clause.

86. Complaint, *supra* note 66, ¶¶ 17–34.

87. The district court took judicial notice that "Ave Maria" means "Hail Mary." *Nurre v. Whitehead*, 520 F. Supp. 2d 1222, 1225, n.3 (W. D. Wash 2007) (citing WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 141 (1984) (defining "Ave Maria" as "The Hail Mary"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 150 (1981) (unabridged) (defining "Ave Maria" as "1. a salutation to the Virgin Mary combined as now used in the Roman Catholic Church with a prayer to her as mother of God")).

88. Justice Alito makes this point. "Many composers including Schubert, Gounod, Verdi, Mozart, Elgar, Saint-Saëns, Rossini, Brahms, Stravinsky, Bruckner, and Rachmaninoff, composed music for the Ave Maria." *Nurre v. Whitehead*, 559 U.S. 1025, 1026, n.1 (2010) (Alito, J., dissenting from denial of certiorari).

89. Wilbur Skeels, Program Note, *Franz Biebl's Ave Maria* (Angelus Domini), <https://web.archive.org/web/20110719132345/http://cantusquercus.com/ave.htm> (last visited Feb. 28, 2018). In program notes to Biebl's Ave Maria, the choral conductor, Wilbur Skeels, relates that Franz X. Biebl, the choir-master of a parish near Munich, Germany, composed the work for a local fire brigade chorus to perform at festivals and competitions. *Id.* The work gained popularity when the Cornell University Glee Club, after a visit to Germany, brought it to the United States. *Id.*

90. Chanticleer, *Ave Maria-Franz Biebl*- Chanticleer, YouTube (Dec. 26, 2008), <https://www.youtube.com/watch?v=XVyCJlPiHFg> (a performance of the spoken words by Chanticleer); Robert C. Cameron, *Franz Biebl: Ave Maria* (arr. Robert C. Cameron), YouTube (Aug. 14, 2010), <https://www.youtube.com/watch?v=ymtVCizCVi4> (an instrumental version).

91. See *supra* notes 70–71 and accompanying text.

A. The Decision to Assess Nurre's Constitutional Claims

On September 20, 2007, Judge Robert S. Lasnik of the Western District of Washington issued the district court opinion.⁹² Before the court were cross motions for summary judgment.⁹³ As an initial matter, the court had to decide (1) whether Nurre's case was moot because she had agreed to perform an alternative piece at her commencement and received her degree; and (2) whether the court could simply grant Whitehead qualified immunity and dispense with any further analysis of Nurre's constitutional claims.⁹⁴

The court agreed with Whitehead that Nurre's graduation mooted her claims for declaratory and injunctive relief.⁹⁵ She had already suffered any alleged damage from the school's prohibition of "Ave Maria" so that those forms of relief no longer served any purpose and were not available.⁹⁶ However, Nurre's graduation did not moot her claim for monetary damages.⁹⁷

On the defendants' qualified immunity defense, the court applied the then controlling Supreme Court test from *Saucier v. Katz*, which required that in deciding whether to grant a defendant qualified immunity the court must first determine whether a constitutional right had been violated on the facts alleged and then, assuming such a violation had occurred, the court would determine whether the right in question had been clearly established.⁹⁸ In 2009 the Supreme Court issued *Pearson v. Callahan*, giving the lower courts discretion to decide which of the two prongs to address first and encouraging dismissal of a case without discussion of the constitutional claim when the court has found the pertinent law was not clearly established.⁹⁹ Had the *Nurre* case been decided after *Pearson*, the discussion of Nurre's constitutional claims probably would not have occurred since the district court not only found there was no constitutional violation, but also found that pertinent law

92. *Nurre*, 520 F. Supp. 2d 1222 (W.D. Wash. 2007).

93. *Id.* at 1224.

94. *Id.* at 1226–27.

95. *Id.* (citing *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1099 (9th Cir. 2000) and *Doe v. Madison Sch. Dist.* No. 321, 177 F.3d 789, 798 (9th Cir. 1999)).

96. *Id.* at 1226 ("[D]efendant requests dismissal of plaintiff's claim for declaratory relief as moot because plaintiff has graduated and will never again participate in an Everett School District graduation ceremony. The Court agrees. Now that plaintiff has graduated, her claims for declaratory relief are dismissed as MOOT.") (citation omitted).

97. *Id.* at 1227.

98. *Nurre*, 520 F. Supp. 2d at 1227; *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *receded from by* *Pearson v. Callahan*, 555 U.S. 223 (2009) ("A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry [I]f a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." (citations omitted)).

99. *Pearson*, 555 U.S. at 236 ("On reconsidering the procedure required in *Saucier*, we conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.").

was not clearly established.¹⁰⁰ But because the then current law required the district court to assess the constitutional claims first, it addressed Nurre's alleged violations of three distinct constitutional rights: (1) the Free Speech Clause; (2) the Establishment Clause; and (3) the Fourteenth Amendment's Equal Protection Clause.¹⁰¹ The following discussion will focus mostly on the Free Speech issue, though it will include the court's treatment of the Establishment and Equal Protection allegations as well as that of the qualified immunity defense where these are relevant to the court's Free Speech analysis.

B. The Performance of the Instrumental Music from Biebl's "Ave Maria" as Constitutionally Protected Speech

i. The District Court

Turning to the free speech issue, the court began its analysis by asking whether an instrumental piece of music such as Biebl's "Ave Maria" is protected speech under the First Amendment.¹⁰² Whitehead had argued that such instrumental music is not protected speech because Nurre had not shown an intent to communicate a particularized message nor that any such message would have been communicated to anyone.¹⁰³ Under *Spence v. Washington*, both are required if non-verbal conduct is to constitute protected speech.¹⁰⁴ Judge Lasnik, however, found ample authority supporting the constitutional protection of instrumental music as free speech. In *Ward v. Rock Against Racism*, the Supreme Court declared, "Music, as a form of expression and communication, is protected under the First Amendment."¹⁰⁵ Noting that neither the Supreme Court nor the Ninth Circuit had specifi-

100. The oral argument before the Ninth Circuit in *Nurre* took place on January 22, 2009, one day after the Supreme Court issued the *Pearson* decision, and the first question that arose was whether the court any longer needed to resolve the constitutional issue to decide the qualified immunity claim, when it could simply dispose of the case by deciding the issue of whether the law would have been clear to a reasonable school official. However, as the panel's opinion indicates, the Ninth Circuit decided to address the constitutional issue as well. Transcript of Oral Argument, *Nurre v. Whitehead*, 580 F.3d 1087 (9th Cir. 2009) (No. 07-35867), 2009 WL 482112.

101. *Nurre*, 520 F. Supp. 2d at 1227–28.

102. *Id.* at 1228 ("The threshold issue in determining whether plaintiff's free speech rights were violated by defendant's prohibition of the performance of Franz Biebl's 'Ave Maria' is whether this piece of music is protected 'speech' under the Free Speech Clause of the First Amendment made applicable to the states by the Fourteenth Amendment.").

103. *Id.*

104. Defendant's Motion for Summary Judgment, *supra* note 30 (quoting *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 410–11 (1974))) ("For nonverbal conduct to qualify as speech, and thus implicate First Amendment 'free speech' protections, the Court asks 'whether [a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'"). Whitehead quoted a district court case which took the view that instrumental music might not be protected speech. *Id.* n.7 (quoting *Fla. Cannabis Action Network, Inc. v. City of Jacksonville*, 130 F. Supp. 2d 1358, 1366 n.7 (M.D. Fla. 2001) ("[O]nly some forms of music may be protected expression while others, such as an instrumental orchestra performance, are not.")).

105. *Nurre*, 520 F. Supp. 2d at 1228 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989)). The *Ward* court went on to say, "In the case before us the performances apparently consisted of remarks

cally held instrumental music to be protected, the court cited other circuits and Supreme Court dicta to this effect.¹⁰⁶ In commenting on the passage quoted above from *Ward*, Judge Richard Posner of the Seventh Circuit had found it implausible that the Supreme Court "thought it was speaking only of vocal music; . . ." ¹⁰⁷ Posner also noted that the Seventh Circuit had held that "wordless music is speech within the meaning of the First Amendment"¹⁰⁸ in *Reed v. Village of Shorewood*, a case stating that in forbidding the playing of rock and roll, a municipality, "would be infringing a First Amendment right, even if the music had no political message—even if it had no words—and the defendants would have to produce a strong justification for thus repressing a form of 'speech.'"¹⁰⁹ In *Steadman v. Texas Rangers*, the Fifth Circuit stated,

"Speech," as we have come to understand that word when used in our First Amendment jurisprudence, extends to many activities that are by their very nature non-verbal: an artist's canvas, a musician's instrumental composition, and a protester's silent picket of an offending entity are all examples of protected, non-verbal "speech."¹¹⁰

In *Bernstein v. United States Department of State*, a court in the Northern District of California declared, "Music . . . is speech protected under the First Amendment."¹¹¹ Judge Lasnik also quoted Supreme Court dicta from *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, stating, "[A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll."¹¹² Based on this authority, the court concluded that the instrumental version of "Ave Maria" was protected speech.¹¹³

by speakers, as well as rock music, but the case has been presented as one in which the constitutional challenge is to the city's regulation of the musical aspects of the concert; and, based on the principle we have stated, the city's guideline must meet the demands of the First Amendment." *Ward*, 491 U.S. at 790.

106. *Nurre*, 520 F. Supp. 2d at 1228–29.

107. *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1096 (7th Cir. 1983) (Posner, J., concurring) (*rev'd on other grounds*, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991)) (quoted by *Nurre*, 520 F. Supp. 2d at 1228–29). Posner based this view on the Supreme Court's reference to "music's appeal to the emotions, and its citation to an article about Soviet ambivalence toward Stravinsky—a composer primarily of nonvocal music . . ." *Id.* (citing *Ward*, 491 U.S. at 790 (citing *Soviet Schizophrenia toward Stravinsky*, N.Y. TIMES, June 26, 1982, section 1, p. 25, col. 2)).

108. *Id.* at 1096 (quoted by *Nurre*, 520 F. Supp. 2d at 1229).

109. *Reed v. Village of Shorewood*, 704 F.2d 943, 950 (7th Cir. 1983), *overruled on other grounds* by *Brunson v. Murray* 843 F.3d 698 (7th Cir. 2016) (quoted by *Nurre*, 520 F. Supp. 2d at 1229) (emphasis added by *Nurre*).

110. *Steadman v. Texas Rangers*, 179 F.3d 360, 367 (5th Cir. 1999) (quoted by *Nurre*, 520 F. Supp. 2d at 1229).

111. *Bernstein v. U.S. Dep't of State*, 922 F. Supp. 1426, 1435 (N.D. Cal. 1996) (quoted by *Nurre*, 520 F. Supp. 2d at 1229).

112. *Nurre*, 520 F. Supp. 2d at 1229 (quoting *Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995) (citations omitted)).

113. *Id.* ("Based on this persuasive authority, the Court concludes that the Wind Ensemble's instrumental performance of Franz Biebl's 'Ave Maria,' constitutes 'speech' under the First Amendment.").

ii. The Appellate Court

In addressing the free speech issue, the Ninth Circuit opinion, written by Judge Richard C. Tallman, began by quoting *Tinker v. Des Moines Independent Community School District*, that students “do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹¹⁴ But the appellate court also noted that Supreme Court precedent taught that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings’ . . . and ‘must be applied in light of the special characteristics of the school environment.’”¹¹⁵ On the question of whether instrumental music can constitute speech, the appellate court followed the district court in finding that musical expression is speech that is protected under the free speech clause, citing the same authorities for this proposition.¹¹⁶ “[W]e hold . . . [the instrumental arrangement of Franz Biebl’s ‘Ave Maria’] . . . is . . . [free] . . . speech as contemplated by the First Amendment.”¹¹⁷

Despite these rulings, both courts were to have difficulty with the concept of wordless music as protected speech. Though judicial precedent indicated that instrumental music need not convey a particularized message to be entitled to constitutional free speech protection, the issue was to arise again under the guise of whether such music had a “viewpoint” under public forum analysis. This was a crucial issue.

iii. Music as Protected Speech

Clearly, courts have stated that instrumental music is protected under the First Amendment. But as Alan K. Chen has pointed out, “[N]o court has ever explained in any meaningful way why the musical, as opposed to lyrical, component of such [musical] expression is independently covered by the Constitution.”¹¹⁸ Sim-

114. *Nurre v. Whitehead*, 580 F.3d 1087, 1092–93 (9th Cir. 2009) (citing *Morse v. Frederick*, 551 U.S. 393, 406 (2007) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969))).

115. *Id.* at 1093 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)).

116. *Id.* at 1093–95.

117. *Id.* at 1093 (“Nurre and her classmates sought to perform an entirely instrumental arrangement of Franz Biebl’s ‘Ave Maria,’ which we hold is speech as contemplated by the First Amendment.” (footnote omitted)).

118. Alan K. Chen, *Instrumental Music and the First Amendment*, 66 HASTINGS L.J. 381, 384 (2015). Chen acknowledges that “[t]he most thoughtful lower court discussion of music” took place in *Miller v. Civil City of South Bend*, which invalidated a city ordinance prohibiting public nudity as applied to non-obscene nude dancing for entertainment. *Id.* at 393. Several judges commented on whether music was protected speech. *Id.* Judge Posner argued that if nude dancing is not speech, then non-vocal music is not speech either. *Id.* at 394. “If the striptease dancing at the Kitty Kat Lounge is not expression, Mozart’s piano concertos and Balanchine’s most famous ballets are not expression.” *Miller*, 904 F.2d at 1093 (Posner, J., concurring). Judge Easterbrook agreed that music is protected speech but argued that it is distinguishable from nude dancing: “That a dance in *Salome* expresses something does not imply that a dance in JR’s Kitty Kat Lounge expresses something. . . . [A]ll that we call music is the product of rational human thought and appeals at least in part to the same faculties in others. It has the ‘capacity to appeal to the intellect’, . . . is not ‘conduct’, and is closer to speech (even an emotional harangue is speech) than to smashing a Ming vase or kicking a cat, two other ways to express emotion.” *Id.* at 1125 (Easterbrook, J., dissenting) (citations omitted).

ilarly, "[t]he scholarly literature is also surprisingly bereft of comprehensive discussions of the theoretical or doctrinal foundations for treating purely instrumental music as expression under the Constitution."¹¹⁹ Chen, however, demonstrates that instrumental musical expression has possessed sufficient meaning to incur suppression by totalitarian, fascist, and theocratic states:

Hitler's regime banned the publication, sale, performance, and broadcast of "Entartete Musik" (degenerate music) . . . [by] Stravinsky, Mahler, and Gershwin. Jewish composers, such as Mendelssohn, were specifically targeted for censorship . . . as was jazz music, quite probably because of its association with African Americans [A] long history of music censorship marks several periods of the Soviet regime . . . including . . . the regulation of the work of Shostakovich [T]he previously Taliban-controlled Afghanistan and the current Iranian government banned instrumental music [A]n Islamist rebel group in northern Mali . . . targeted what they viewed as "Satan's music" . . . offensive to the standards of Sharia.¹²⁰

In *Rock Against Racism*, the Supreme Court similarly observed:

"From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known [music's] capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state The Constitution prohibits any like attempts in our own legal order."¹²¹

This history of censorship suggests that, with or without words, music has expressive qualities that threaten oppressive regimes. Expression that tyrants believe is worth suppressing may well be worth protecting in free societies.

Instrumental music, however, does not immediately suggest a form of expression protected by the First Amendment because music without words is generally not a vehicle for expressing cognitive ideas. Unlike novels and plays, instrumental music has no words. Nor do musical sounds consist of images that may evoke or symbolize such ideas, as do visually representational arts like painting and sculpture. Instrumental music is highly nonrepresentational.¹²² Some musical works may evoke or intensify specific ideas by association. A John Philip Sousa march can arouse thoughts of patriotic parades, or the music of Wagner's Bridal Chorus can evoke thoughts of weddings. But this is largely due to cultural experience. Though the character of the music may be receptive to these ideas, the specific associations are largely extrinsic to the sounds of the music itself. A central challenge to treating instrumental music as speech "is that music inherently lacks a particularized message or idea. In fact, one of the reasons music can be so uniquely expressive is in this very absence of [any particular] message."¹²³

119. Chen, *supra* note 118, at 384.

120. *Id.* at 400–01 (footnotes omitted).

121. *Ward*, 491 U.S. at 790.

122. Chen, *supra* note 118, at 436.

123. *Id.*

As with other associations, the sounds of music do not in and of themselves present a message, religious or sectarian, except by association.¹²⁴ Take for example, the melody to which the lyrics of “Greensleeves” and “What Child Is This?” are set.¹²⁵ Originally, the traditional folk melody was accompanied by lyrics suggestive of a romantic encounter.¹²⁶ Later, religious lyrics were applied to the melody making it a religious Christmas carol.¹²⁷ The melody itself is not inherently romantic or religious, but only takes on these qualities by its association with the words that it has attracted to itself. Likewise, the melody for one of the well-known versions of “Ave Maria,” that of Bach-Gounod, originated as Bach’s instrumental Prelude No. 1 in C Major.¹²⁸ This appears in Book One of the Well-Tempered Clavier, which was not a religious work at all, but rather an exercise of composing keyboard works in each of the major and minor keys to show the advantages of a particular method of tuning.¹²⁹ Charles Gounod later set the religious lyrics to Bach’s melody, and this is

124. Perrine, *supra* note 25, at 184, argues that the legal distinction between religious and secular does not neatly apply to musical genres:

[C]ategorical distinctions between . . . the sacred and secular are not quite so clear cut. In music, the Western classical tradition grew out of a complex interplay between the musical requirements for worship . . . and state requirements for musical performance Ostensibly sacred genres such as the mass were written for performance in secular venues Important instrumental genres such as the sonata originally developed through the patronage of and for performance within the church. Franz Biebl’s *Ave Maria* . . . was written for a German fire department choir to sing at an amateur choral festival.

Id.

125. There is a recording of “Greensleeves” from the television series, “The Tudors” (2007-10), at hiserature, *The Tudors: Greensleeves*, YOUTUBE (Dec. 23, 2007), https://www.youtube.com/watch?v=mmh9__ml51g. A recording of “What Child Is This” by Josh Grobin (2010) may be found at MyJesusGod1, *Josh Grobin, What Child Is This*, YOUTUBE (Dec. 22, 2010), <https://www.youtube.com/watch?v=brmRUIKbF7g>.

126. A song by this title appears as a broadside ballad by Richard Jones, entitled, “A Newe North-ern Dittye of ye Ladye Greene Sleeves.” See John M. Ward, *And Who But Ladie Greensleeves?*, in *THE WELL ENCHANTING SKILL: MUSIC, POETRY, AND DRAMA IN THE CULTURE OF THE RENAISSANCE: ESSAYS IN HONOUR OF F.W. STERNFELD 181* (John Caldwell, Edward Olleson, & Susan Wollenberg, eds., 1990).

127. The melody became associated with Christmas and New Year’s texts as early as 1686. *Id.* at 193. In 1865, William Chatterton Dix wrote a poem entitled, “The Manger Throne.” WILLIAM D. CRUMP, *THE CHRISTMAS ENCYCLOPEDIA* 437–38 (McFarland, 3d ed. 2012) (2001). In 1871, three stanzas from this poem were set to the melody of “Greensleeves” under the title of “What Child Is This?” *Id.* See *CHRISTMAS CAROLS OLD AND NEW*, Hymn XIV, 32–33 (Henry Ramsden Bramley & John Stainer, eds. 1871).

128. *BAKER’S BIOGRAPHICAL DICTIONARY OF MUSICIANS* 1339 (Nicolas Slonimsky ed., 7th ed. 1984) (1900) (“One of [Gounod’s] most popular settings to religious words is Ave Maria, adapted to the 1st prelude of Bach’s Well-Tempered Clavier, but its original version was Meditation sur le premier Prelude de Piano de J.S. Bach for Violin and Piano (1853); the words were later added (1859).”). See Jonassen, *supra* note 25, at 758 n.482.

129. The Well-Tempered Clavier was a highly practical musical exercise demonstrating how musical pieces may be written in every key for a keyboard instrument, the clavier, when it is evenly tuned or “tempered.” *BAKER’S BIOGRAPHICAL DICTIONARY OF MUSICIANS* 1:161 (Nicolas Slonimsky ed., 7th ed. 1984) (1900). (“Bach’s system of ‘equal temperament’ (which is the meaning of ‘well-tempered’ in the title Well-Tempered Clavier) postulated the division of the octave into 12 equal semitones, making it possible to transpose and to effect a modulation into any key, a process unworkable in the chaotic tuning of keyboard instruments before Bach’s time.”).

what associates the particular melody with a religious theme.¹³⁰ It is perhaps true that certain melodies have qualities that are receptive to certain words or thoughts. Nevertheless, instrumental religious music does not, in and of itself, project any particularized religious message, though it certainly can receive one through association. Separated from any association, religious or secular, all that can be said is that music projects the aesthetic qualities of its own sound and rhythm performed and received for its beauty as an artistic expression, regardless of the name given to the music.¹³¹

Some scholars have taken a narrow view of what speech the First Amendment protects.¹³² Robert Bork, for example, asserted, "Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic."¹³³ Under this theory, the Constitution protects only cognitive ideas that advance the democratic values of debate and discussion in the marketplace of ideas.¹³⁴ This cognitive theory of First Amendment protection also appears in case law requiring a particularized message such as *Spence v. State of Washington*.¹³⁵ However, in *Texas v. Johnson*, the Supreme Court extended free speech protections beyond "particularized meaning" in recognizing the burning of an American flag as speech not because the act was a specific, particularized message, but rather because it was expressive conduct that was intentional and overtly political.¹³⁶ The context made the flag burning "sufficiently imbued with elements of communication."¹³⁷ In *National Endowment for the*

130. *Id.* at 2.1339. Gounod's application of Bach's Prelude from the Well-Tempered Clavier to a prayer demonstrates that music really consists of an aesthetic arrangement of sounds with scant correspondence to lexical meaning.

131. For that matter, names in general, and religious names in particular, do not necessarily denote the character of the objects they signify. Objecting to the name, "Ave Maria," which happens to signify a piece of music, logically leads to intolerance for the names of many American cities which might appear in graduation programs, such as Sacramento, Corpus Christi, Las Cruces, San Diego, Los Angeles, or St. Louis. See *Nurre v. Whitehead*, 580 F.3d 1087, 1102 (9th Cir. 2009) (Smith, J., dissenting in part, but concurring in judgment) ("As amicus for Nurre notes, many common proper nouns to secular entities have religious origins. For example, the cities Los Angeles (originally 'our lady of the city of angels'), San Diego ('Saint Didacus'), and Las Cruces ('the crosses') each contain overt religious references."). *Id.* at 1102 n.3.

132. Chen, *supra* note 118, at 404.

133. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971) (quoted by Chen, *supra* note 118, at 404).

134. But, "[i]f the purpose and scope of the First Amendment's speech and press clauses are exhausted in the protection of political speech, because freedom of political speech is all that is necessary to preserve our democratic political system, this implies the exclusion from the amendment's protections not only of all art (other than the political) but also of science. For one can have democracy without science, just as one can have democracy without art." *Miller v. Civil City of S. Bend*, 904 F.2d 1081, 1096 (7th Cir. 1990) (Posner, J., concurring).

135. *Spence v. Washington*, 418 U.S. 405, 410–11 (1974). The Supreme Court held that nonverbal conduct is protected speech only when there is present "[a]n intent to convey a particularized message . . . and in the surrounding circumstances the likelihood [is] great that the message would be understood by those who viewed it." *Id.*

136. *Texas v. Johnson*, 491 U.S. 397, 405–06 (1989). See Chen, *supra* note 118, at 389–90 ("[I]n . . . *Texas v. Johnson*, the Court recognized the burning of an American flag as speech, even though neither the flag burner's intent nor the audience's understanding of his message could be said to be particularized.").

137. *Johnson*, 491 U.S. at 406 (quoting *Spence*, 418 U.S. at 409).

Arts v. Finley, the Court extended protections for nonverbal speech by assuming the works of a variety of artists to be speech without discussing whether their art would convey a specific or particularized message to those who viewed it.¹³⁸ And, as noted above, the Supreme Court has stated, “[A] narrow succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a ‘particularized message,’ would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll.”¹³⁹ Thus, Bork and *Spence* notwithstanding, the courts should not require nonverbal expression to convey a particularized message from speaker to listener in order to bestow Free Speech protection upon instrumental music.¹⁴⁰

After examining several theories of why instrumental music should enjoy the protection of the First Amendment, Chen concludes that two aspects of pure instrumental music justify constitutional protection: (1) “[I]t advances expression of important forms of cultural, religious, nationalist, and other social values”¹⁴¹ Thus, music unites people who share in their familiarity and appreciation of the music in question and also provides respect for diversity of taste given the distinct music that various cultures generate and admire. (2) “[I]t serves a completely individualizing function, . . . to the extent that it promotes highly personal expressions and experiences of emotion.”¹⁴² In this respect, music develops self-realization, self-fulfillment, and individual autonomy.

Chen’s second justification is particularly relevant to *Nurre* because, in promoting personal expression, musical sounds do not have to be associated with any extrinsic ideas. *Nurre* testified that the students did not choose *Ave Maria* to communicate a “religious message,” but rather because of its “beauty,” and nowhere in the record of the case does any evidence contradict this statement, nor did the courts question it.¹⁴³ Accordingly, the students only intended to convey the beauty

138. Nat’l Endowment of Arts v. *Finley*, 524 U.S. 569, 571 (1998). See Chen, *supra* note 118, at 390.

139. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995) (citation omitted).

140. Chen, *supra* note 118, at 390. The standard should be applicable to instrumental music, which is also expressive conduct, but which usually cannot be said to have a particularized meaning intended by the performer and recognized by the audience. *Id.*

141. *Id.* at 437 (“In its expression of culture, music serves important social functions by connecting people within and between different communities, and its recognition as a form of speech ensures that government efforts to establish a cultural orthodoxy, like attempts to create a political or religious orthodoxy, are thwarted.”).

142. *Id.* at 438 (“Instrumental music allows people to express (through composition, performance, and feeling) and experience (through listening, interpreting, and feeling), as no other medium of communication can. Thus, while music serves a community building function in terms of cultural expression, it simultaneously advances an autonomy-promoting function in its facilitation of individualized emotional expression and experience. As developed in more detail above, music’s role in expressing, evoking, and experiencing the emotional could easily be argued to promote self-realization.”).

143. See *supra* note 37 and accompanying text. *Nurre* herself was not Catholic. See Declaration of Kathryn Nurre, *supra* note 37, ¶ 34 (“While I am not a Catholic and oppose praising any ‘Mary’ to the point of deification, I had no and have no objection or taken offense to the title of the song we chose, ‘Ave Maria,’ the listing of such title in my school printed program or the playing of such song at any graduation ceremony.”). In “Ave Maria,” or the “Hail Mary,” there is no deification of the Virgin Mary, which is contrary to Catholic theology. Rather the prayer is a request for intercession with God, as its words indicate, “Holy Mary, Mother of God, pray for us sinners, now and at the hour of our death. Amen.”

of the piece of music they had selected. The desire to perform "Ave Maria" was nothing more nor less than an attempt to share with the audience the notes, melody, harmony, and orchestration of the work, all as interpreted by the students in their performance. It was an artistic message which the school authorities suppressed, and not any particularized message or viewpoint about religion or anything else.

As this Article will show, in *Nurre*, the idea that a mode of expression which does not project any particularized message is due constitutional protection as speech created a distinct problem for the courts in their application of public forum analysis. In a limited public forum, the government is not permitted to discriminate against viewpoint.¹⁴⁴ Does this mean that the mode of expression must have a particularized message, such as a religious statement, in order to have a viewpoint and thereby merit protection? What is the viewpoint of artistic expression that is generated only for its beauty and not for any particularized message? If wordless music lacks such a specific point of view, does that mean this form of expression has no protection under public forum analysis? And if such music has no viewpoint or protection, then what is the point of all that precedent stating that instrumental music is protected speech?

The courts in *Nurre* were rather inattentive, if not clueless, as to how the non-representational nature of the music affected their treatment of viewpoint and the students' rights of free speech. While the district court treated "Ave Maria" as if it could mean anything, sometimes having a message, or viewpoint, and sometimes not, the appellate court treated the music as if it meant nothing at all and was therefore devoid of viewpoint, or constitutional protection. What was common to both approaches was an unfavorable result for the speech rights of the students.¹⁴⁵

C. The Wind Ensemble's Performance as a Limited Public Forum

i. The District Court

In the cross motions for summary judgment that were before the district court, both parties had argued that public forum analysis should be applied to determine the extent of First Amendment protection that ought to be afforded to the students' performance of "Ave Maria."¹⁴⁶ The court noted that forum analysis is "a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes."¹⁴⁷ Though the graduation ceremony did not take

144. "The State may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum,' nor may it discriminate against speech on the basis of its viewpoint." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (emphasis added) (citations omitted).

145. Cf. *Perrine*, *supra* note 25, at 193 ("Franz Biebl's *Ave Maria* falls within a cultural tradition in which musical works can function aesthetically within both a secular and religious context. This cultural precedent should be respected by the courts. . . . Teachers and schools which allow a forum for student expression should respect students' artistic choices.").

146. *Nurre v. Whitehead*, 520 F. Supp. 2d 1222, 1229 (W.D. Wash. 2007) ("Both parties assert that in determining the First Amendment's reach in this case, the Court should look to the forum where the speech is presented.").

147. *Id.* (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985)).

place on school property, forum analysis was applicable because the Everett School District rented the facility and sponsored the event.¹⁴⁸

The district court ably presented Ninth Circuit and Supreme Court precedent on forum analysis. Government property is divided into three basic categories: The “public forum, [the] designated public forum, and [the] nonpublic forum.”¹⁴⁹ The public forum is a place such as a street or park that has been traditionally open for public use, such as speech and communication.¹⁵⁰ A designated government forum is a government property which the state has intentionally opened for public expression.¹⁵¹ A nonpublic forum is a government property which neither tradition nor government designation has made a forum for public discourse.¹⁵² The Supreme Court has indicated that the state may also create a “limited public forum,” that is, a nonpublic forum in which the state may limit speech for the use of certain groups or the discussion of certain subjects.¹⁵³

The ability of the government to limit a person’s speech is contingent upon the type of forum in which the speech occurs. A court applies strict scrutiny to government speech limitations in traditional or designated public forums.¹⁵⁴ In a traditional or designated public forum, the state may enforce a content-based restriction on speech only if it can show that the restriction is necessary to serve a compelling state interest and is narrowly drawn to achieve that purpose.¹⁵⁵ The state may also apply time, place, and manner limitations on speech as long as these limitations are narrowly tailored to achieve a government interest and allow for alternative channels of communication.¹⁵⁶ In a nonpublic forum, a regulation on speech need only be reasonable and not an effort to suppress the speaker’s viewpoint.¹⁵⁷ The government may limit speech in a limited public forum as long as the restriction is reasonable in the light of the forum’s purpose and does not discriminate against a point of view.¹⁵⁸

Whitehead argued that the Jackson High School graduation was simply a nonpublic forum because the school district exercised supervisory control of all conduct and speech at the graduation ceremony, setting parameters on the music that the Wind Ensemble could play.¹⁵⁹ Nurre contended that the Wind Ensemble performance, as opposed to the rest of the graduation ceremony, was a limited public

148. *Id.* at 1229–30 (citing *Summum v. Duchesne City*, 482 F.3d 1263, 1270 (10th Cir. 2007), *vacated by* *Duchesne City v. Summum*, 555 U.S. 1210 (2009)).

149. *Id.* at 1230.

150. *Id.* (citing *DiLoreto v. Downey Unified Sch. Dist. Bd. Of Educ.*, 196 F.3d 958, 964 (9th Cir. 1999)); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

151. *Nurre*, 520 F. Supp. 2d at 1230 (citing *DiLoreto*, 196 F.3d at 964); *Cornelius*, 473 U.S. at 802.

152. *Nurre*, 520 F. Supp. 2d at 1230; *Perry*, 460 U.S. at 46.

153. *Nurre*, 520 F. Supp. 2d at 1230 (citing *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 908 (9th Cir. 2007), *abrogated by* *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7 (2008). *Rosenberger*, 515 U.S. at 829 (citing *Cornelius*, 473 U.S. at 806.).

154. *Nurre*, 520 F. Supp. 2d at 1230; *Perry*, 460 U.S. at 45.

155. *Nurre*, 520 F. Supp. 2d at 1230; *Perry*, 460 U.S. at 45.

156. *Nurre*, 520 F. Supp. 2d at 1230; *Perry*, 460 U.S. at 45.

157. *Nurre*, 520 F. Supp. 2d at 1230 (citing *Int’l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992)).

158. *Id.* (citing *Glover* 480 F.3d at 908); *Rosenberger*, 515 U.S. at 829 (citing *Cornelius*, 473 U.S. at 806.)

159. *Nurre*, 520 F. Supp. 2d at 1230; Defendant’s Motion for Summary Judgment, *supra* note 30.

forum.¹⁶⁰ Nurre argued that the designation depended on whether Jackson High School had a tradition in which the school had opened a portion of the graduation ceremony to a group, the seniors of the Wind Ensemble, for them to choose their form of musical expression, thereby creating the limited public forum.¹⁶¹ Both Moffat and Nurre testified that Jackson High School had a tradition for the previous three years of allowing the graduating senior members of the Wind Ensemble to choose an instrumental piece to perform at graduation.¹⁶² Nurre claimed this tradition existed even before the three years Moffat had given the Wind Ensemble seniors this choice.¹⁶³ Whitehead presented the testimony of the previous director, Rice, that he had never allowed the students to choose the music they would play at graduation.¹⁶⁴ The district court noted that under the Defendant's Motion for Summary Judgment, the court was "required to view all facts and draw all reasonable inferences in favor of the nonmoving party."¹⁶⁵ The court, therefore, concluded, "for purposes of summary judgment there are sufficient facts showing that the School District created a limited public forum when it allowed the Wind Ensemble's seniors to choose the piece for performance at the JHS 2006 graduation."¹⁶⁶

ii. The Appellate Court

After following the district court in finding that the performance of "Ave Maria" was free speech protected by the First Amendment, the Ninth Circuit also turned to the public forum question. Judge Tallman agreed that since the performance was to take place within a government property, the next step was to determine the type of forum that was created and assess whether the school district's restriction was constitutionally permitted under that forum.¹⁶⁷ Tallman observed that a school is typically a non-public forum, but it may become a public forum "if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public,' or some segment of the public, such as student organizations."¹⁶⁸ The appellate court noted that Nurre did not claim the graduation ceremony was a public forum, but rather that school administrators created a "limited public forum" by permitting the students to select the musical piece to perform

160. *Nurre*, 520 F. Supp. 2d at 1230–31; Plaintiff Nurre's Response in Opposition to Defendant's Motion for Summary Judgment, *Nurre v. Whitehead*, 520 F. Supp. 2d 1222 (W.D. Wash. 2007) (No. C06-901RSL), 2007 WL 4868958.

161. Plaintiff Nurre's Response in Opposition, *supra* note 160.

162. *Nurre*, 520 F. Supp. 2d at 1231 (citing Deposition Upon Oral Examination of Lesley Moffat, *supra* note 37, at 17:4–7 ("Q. Does the Jackson High School wind ensemble have a tradition of having the seniors choose a final piece for the graduation. A. Yes."); Declaration of Kathryn Nurre, *supra* note 37, ¶ 11 ("Part of this traditional [graduation] performance by the Wind Ensemble included having the graduating seniors choose an instrumental piece to be performed at their graduation ceremonies.")).

163. Defendant's Motion for Summary Judgment, *supra* note 30.

164. *Nurre*, 520 F. Supp. 2d at 1231 (citation omitted).

165. *Id.* (citation omitted).

166. *Id.*

167. *Nurre*, 580 F.3d at 1093 ("[W]e must determine the type of forum created by the government when Nurre sought to perform 'Ave Maria'—that is, the relevant forum—and then assess whether the District's restriction was constitutionally permissible in light of that forum.").

168. *Id.* (quoting *Perry*, 460 U.S. at 47).

during graduation.¹⁶⁹ However, the Ninth Circuit had “never definitively determined what forum is created when a school district holds graduation, or, as in this case, when part of the graduation ceremony presents student-selected work.”¹⁷⁰ The appellate court believed that it did not have to decide the question in this case because “the [School] District d[id] not challenge Nurre’s contention that a limited public forum existed here. Instead, it simply argue[d] that the restriction placed on Nurre was reasonable in light of the purpose served by the graduation ceremonies.”¹⁷¹ The court concluded, “[t]herefore, we assume, without deciding, that a limited public forum was created.”¹⁷²

iii. The Assumption of a Limited Public Forum

Both district and appellate courts assumed Jackson High School had established a limited public forum in regard to the part of its graduation ceremony in which the Wind Ensemble seniors would perform the music of their choice. Neither actually found that Jackson High School did in fact do so. The district court assumed there existed a limited public forum since the plaintiff had alleged facts which, if proven, would be sufficient to show the school had established such a forum.¹⁷³ This was a question of fact which, on Whitehead’s summary judgment motion, the court had to resolve in favor of the non-moving party, Nurre. The appeals court explicitly said it was not deciding whether part of a public school graduation ceremony becomes a limited public forum when students select their own music to perform, but only assumed a limited public forum was created because the school district did not contest the issue at the appellate level.¹⁷⁴

Once these courts assumed the existence of a limited public forum, they should not have granted summary judgment to the defendant school district unless there was no genuine dispute of material fact that the school district had not violated the students’ rights within the limited public forum.¹⁷⁵ This conclusion could not be reached by any reasoning that would contradict or vitiate the assumption that a limited public forum existed. The courts’ analysis should not have been influenced or affected by any underlying doubt that the court would eventually hold that no part of a public school graduation ceremony could possibly be a limited public forum, by any belief that Nurre’s factual allegations would be disproven at trial, or by any undue deference to the school officials’ authority. Having declined to rule on the matter given the alleged facts before the court, and having explicitly

169. *Id.* at 1093–94.

170. *Id.* at 1094.

171. *Id.* Although Whitehead argued at the district court that the Wind Ensemble performance was a nonpublic forum, it is correct, as the Circuit Court has it, that Whitehead did not contest this issue in its Appellee’s Answering Brief, *Nurre v. Whitehead*, 580 F.3d 1087 (9th Cir. 2009) (No. 07-35867).

172. *Nurre*, 580 F.3d at 1094.

173. *See id.* at 1093.

174. *See id.* at 1094.

175. Fed. R. Civ. P. 56(a) (“Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.”).

accepted the assumption, the courts should have produced a rigorous analysis as if they indeed had decided that the Wind Ensemble's performance was a limited public forum. And given their assumption that the Wind Ensemble performance was a limited public forum, the courts could not countenance the school's unreasonable termination of that forum. "Once it has opened a limited forum . . . the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum."¹⁷⁶

D. The Application of Forum Analysis to the Wind Ensemble's Performance of the Instrumental Music from Biebl's "Ave Maria"

After stating its assumption that the Wind Ensemble portion of the graduation ceremony was a limited public forum, the district court turned to the task of applying the test for permissible government limitations on speech in a limited public forum. Under this test, the government would be able to restrict speech if the restriction was (1) viewpoint neutral, and (2) reasonable in the light of the purpose of the forum.¹⁷⁷ Both conditions of viewpoint neutrality and reasonableness must be met for the restriction to be constitutional.¹⁷⁸ The government may choose the group that is entitled to speak and the subjects that may be discussed in a limited public forum so that the government may restrict the speakers and content of speech accordingly.¹⁷⁹

i. Viewpoint Neutrality

a. The District Court

In regard to viewpoint, the government may not discriminate against a particular viewpoint or deny access to a speaker with a particular perspective that is within the forum's limitations of content.¹⁸⁰ The district court recognized that the distinction between content and viewpoint regulation is not a precise one.¹⁸¹ Nevertheless, the court found the "exclusion of 'Ave Maria' was based on permissible content restriction, not impermissible viewpoint discrimination," because the exclusion resulted from "a decision to keep religion out of graduation as a whole, not

176. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (citations omitted).

177. *Nurre*, 520 F. Supp. 2d at 1231 ("[D]efendant's prohibition on the performance of 'Ave Maria' is not a violation of plaintiff's free speech rights if the restriction is viewpoint neutral and reasonable in light of the purpose of the forum." (citing *Glover*, 480 F.3d at 908)); *Rosenberger*, 515 U.S. at 829.

178. *Nurre*, 520 F. Supp. 2d at 1230.

179. *Id.* at 1231.

180. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 n.7 (1983) ("A public forum may be created for a limited purpose such as use by certain groups (student groups), or for the discussion of certain subjects (school board business.") (citations omitted)).

181. *Nurre*, 520 F. Supp. 2d at 1231 (citing *Glover*, 480 F.3d at 911 (quoting *Rosenberger*, 515 U.S. at 829)). ("In determining whether the restriction is viewpoint neutral, the Court must identify whether exclusion of 'Ave Maria' is 'content discrimination, which may be permissible if it preserves the purpose of [the] limited forum [or] viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.'").

to discriminate against a specific religious sect or creed.”¹⁸² The court quoted Brandsma’s e-mail instructing principals that music for graduation ceremonies be “entirely secular” in nature, and also Whitehead’s testimony to the same effect.¹⁸³ The court then made the following statement:

The case would be different if the exclusion had been based on excluding a particular religious sect or creed. However, the Court finds the blanket restriction on the exclusion of religious music that occurred in this case is one based on content, not viewpoint.¹⁸⁴

The district court’s argument relies heavily on *Faith Center Church Evangelistic Ministries v. Glover*, a Ninth Circuit opinion.¹⁸⁵ In that case, the Ninth Circuit found that a public library created a limited public forum by allowing community organizations to use its conference room facilities.¹⁸⁶ The Circuit held that the Contra Costa County Library did not discriminate against the religious viewpoint of Faith Center Church Evangelistic Ministries in prohibiting the use of the library’s meeting rooms for “religious services or activities”¹⁸⁷ because the prohibition was applicable to all religious groups rather than to this particular religious group.¹⁸⁸ The district court quoted the *Glover* opinion’s pertinent statement:

If the County had, for example, excluded from its forum religious worship services by Mennonites, then we would conclude that the County had engaged in unlawful viewpoint discrimination against the Mennonite religion. But a blanket exclusion of religious worship services from the forum is one based on the content of speech.¹⁸⁹

This very quotation should have indicated to the district court that *Glover* is obviously distinguishable from *Nurre*. The *Glover* case concerned “religious worship services”; *Nurre* did not.¹⁹⁰ The Jackson High seniors did not intend to lead the audience in any semblance of prayer or worship. It was for aesthetic reasons that they wanted to perform a musical work whose title happened to be “Ave Maria.”¹⁹¹ The

182. *Id.* at 1231–32.

183. *Supra* notes 62–63 and accompanying text.

184. *Nurre*, 520 F. Supp. 2d at 1232.

185. *Id.* (citing *Glover*, 480 F.3d at 915).

186. *Glover*, 480 F.3d at 910 (“We therefore hold that the Antioch Library meeting room is a limited public forum whose restrictions to access may be based on subject matter . . . so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.” (citations and quotations omitted)).

187. *Id.* at 903.

188. *Id.* at 915 (“Religious worship, . . . is not a viewpoint but a category of discussion within which many different religious perspectives abound.”). “We therefore conclude that prohibiting Faith Center’s religious worship services from the Antioch meeting room is a permissible exclusion of a category of speech that is meant to preserve the purpose behind the limited public forum.” *Id.* at 918

189. *Nurre*, 520 F. Supp. 2d at 1232 (quoting *Glover*, 480 F.3d at 915).

190. *Glover*, 480 F.3d at 910; *Nurre*, 520 F. Supp. 2d 1222.

191. See *supra* notes 36–37 and accompanying text; Jonassen, *supra* note 25, at 756–57 (“The performance of religious music in a secular setting such as a graduation or a concert is distinguishable from worship, since in such a setting the audience primarily appreciates the music for its artistic merits, and not as a vehicle to communicate with God.”).

music was instrumental only, purged of any religious reference except for its title.¹⁹² With or without the title, it was unrealistic to think the audience would have perceived the performance to be a religious service or worship. The graduation performance of "Ave Maria," therefore, could not reasonably be construed as religious worship.

Further examination of *Glover* only deepens its dissimilarity from *Nurre*. *Glover* held that there is a difference between speech that is dedicated to worship or praise of God and speech that is about religion or that simply possesses religious content. The *Glover* court based this view on a fragment of dicta from *Good News Club*, which, the *Glover* court argued, distinguished between "mere religious worship, divorced from any teaching of moral values" and therefore possessing no viewpoint, and other religious activities which provide opinions about moral values, and which therefore possess viewpoints.¹⁹³ Because religious worship is devoid of viewpoint, the argument proceeds, worship does not constitute protected speech for the purposes of public forum analysis, whereas speech about religion contains viewpoints which are protected under public forum analysis.¹⁹⁴ In the *Glover* passage discussing the impermissibility of excluding one religion and not another, the Ninth Circuit was talking about the exclusion of "religious worship services," not religious commentary.¹⁹⁵ Based on this distinction, the *Glover* court held that the County Library could maintain a blanket exclusion of religious worship ceremonies.¹⁹⁶

However, the *Glover* majority made it quite clear that the County Library's policy would not have been constitutional if it had prohibited the Faith Center

192. See *Nurre*, 520 F. Supp. 2d at 1225.

193. *Glover*, 480 F.3d at 913 (quoting *Good News Club v. Milford Central School*, 533 U.S. 96, 112 n.4 (2001)). See *contra, id.* at 899–901 (Bybee, J., with whom O'Scannlain, Kleinfeld, Tallman, Callahan, Bea, and Smith, Jr., join, dissenting from denial of hearing en banc) ("The [Supreme] Court was pointing out only that the Club's activities were reasonably related to the purposes of the limited forum: in that sense, the Club's activities were not 'mere religious worship' lacking any connection to the purpose of the forum. If the Club had attempted to conduct worship that contained no references to moral and character development in children, the school could have denied permission for such use, just as it could have denied permission for a 'mere political discussion' or a 'mere Tupperware party' also devoid of such content. The relevant distinction was between 'mere religious worship' and worship that bore a relationship to the narrow purposes of the dedicated forum, not between a category of fully protected religious speech with a secular component or counterpart and speech that is less protected because it is exclusively religious.").

194. The *Glover* court went on to argue that the government may not be competent to distinguish between the two, but the Faith Center Church itself made that distinction by separating its worship services from discussions about religion. *Id.* at 918 ("The distinction to be drawn here is thus much more challenging—one between religious worship and virtually all other forms of religious speech—and one that the government and the courts are not competent to make. That distinction, however, was already made by Faith Center itself when it separated its afternoon religious worship service from its morning activities. Faith Center admits that it occupied the Antioch forum in the afternoon of May 29, 2004 expressly for 'praise and worship.' The County may not be able to identify whether Faith Center has engaged in pure religious worship, but Faith Center can and did.").

195. *Id.* at 915.

196. *Id.* ("Pure religious worship, however, is not a secular activity that conveys a religious viewpoint on otherwise permissible subject matter. For every other topic of discussion that Faith Center engages in—the Bible, communication, social and political issues, life experiences—religious and non-religious perspectives exist. The same can be said for moral and character development in *Good News Club*, child rearing in *Lamb's Chapel*, and the topic of religion itself in *Rosenberger*."). See *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

Church from using the library's facilities to discuss religious topics, "such as how to communicate effectively with one's God."¹⁹⁷ Such commentaries would present a religious viewpoint, so that banning them in a limited public forum would be illicit viewpoint discrimination. "It would . . . be viewpoint discrimination for the County to exclude Faith Center's perspective on the subject of communication because of the religious content of Faith Center's speech."¹⁹⁸

The proposed performance of "Ave Maria" at the Jackson High School graduation was certainly not worship. Although it was not intended to be religious commentary either, it could conceivably be construed as musical commentary on a religious idea. But even if it were, *Glover* would stand for protecting this speech in a limited public forum precisely because of the distinction the Ninth Circuit made between religious worship and religious commentary. Banning "Ave Maria" then, would be viewpoint discrimination under *Glover*. Thus, *Glover* did not approve of a blanket policy prohibiting any and all expression related to religion in a limited public forum, as was implemented by the school officials in *Nurre*: it did the opposite.

b. The Appellate Court

Like the district court, the Ninth Circuit adopted the limited public forum test: "In a nonpublic forum opened for a limited purpose, restrictions on access 'can be based on subject matter . . . so long as the distinctions drawn are reasonable in light of the purpose served by the forum' and all the surrounding circumstances."¹⁹⁹ Judge Tallman, however, did not follow the district court's argument that relied so heavily on *Glover*. This is, perhaps, because he had penned a rather robust dissent in that very case.²⁰⁰ Tallman disagreed that there was a constitutional distinction between the speech of religious worship and the speech of religious discussion. He had rather good grounds for his dissent, for he quoted the Supreme Court in its refusal to recognize such a distinction in *Widmar v. Vincent*, which said "religious worship and discussion . . . are forms of speech and association protected by the First Amendment."²⁰¹ Given his previous dissent, Tallman could not depend on *Glover* for the proposition that the performance of "Ave Maria" had no viewpoint and therefore no protection because it would be religious worship.²⁰² Nor could he

197. *Glover*, 480 F.3d at 914 ("[T]he morning workshop was devoted to the topic of communication and how to communicate effectively with one's God. Although Faith Center's activities may have included 'quintessentially religious' speech such as a call to prayer, *Good News Club* makes clear that such speech in furtherance of communicating an idea from a religious point of view cannot be grounds for exclusion.").

198. *Id.*

199. *Nurre v. Whitehead*, 580 F.3d 1087, 1095 (9th Cir. 2009) (quoting *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 967 (9th Cir. 1999) (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806, 808 (1985))).

200. *Glover*, 480 F.3d at 921 (Tallman, J., dissenting).

201. *Id.* (quoting *Widmar v. Vincent*, 454 U.S. 263, 269 (1981)).

202. *Glover*, 480 F.3d at 914–15.

square the prohibition of "Ave Maria" as religious commentary given *Glover's* holding that the banning of such speech would be viewpoint discrimination.²⁰³ Therefore, Tallman used a different approach, one that was, perhaps, suggested by the district court.

In a footnote, Judge Lasnik mentioned an alternative means of disposing of the viewpoint issue. "Plaintiff's case is further weakened . . . by the fact that she appears to have no religious viewpoint on the performance of 'Ave Maria.'"²⁰⁴ The idea appears to be that because Nurre had disclaimed any religious intent or message, she had no viewpoint which warranted constitutional protection.

Judge Tallman did not discuss viewpoint discrimination in the text of the appellate opinion.²⁰⁵ Instead, he summarily disposed of the entire issue in a footnote, declaring, "[T]his is not a case involving viewpoint discrimination which would be impermissible no matter the forum. Nurre concedes that she was not attempting to express any specific religious viewpoint, but that she sought only to 'play a pretty piece.'"²⁰⁶ The appellate court then quoted *Rosenberger v. Rector and Visitors of the University of Virginia*: "When the government targets not subject matter, but particular views taken by the speakers on a subject, the violation of the First Amendment is [viewpoint discrimination]....The government must abstain from regulating speech when the specific *motivating ideology or the opinion or perspective of the speaker* is the rationale for the restriction."²⁰⁷ The point of the quotation seems to be that viewpoint discrimination is only concerned with regulating the "motivating ideology, or the opinion or perspective of the speaker," and because Nurre had declared she intended to convey no religious message (no religious ideology, opinion, or perspective), the government could not have been guilty of viewpoint discrimination. There simply was nothing to discriminate against, except the desire to "play a pretty piece." By assuming that the only possible viewpoint Nurre could have had in her desire to perform "Ave Maria" had to be religious, the court enabled itself to conclude that no viewpoint at all was involved and therefore no viewpoint discrimination.

c. The Courts' Discussions of Viewpoint

Both the district and appellate courts had ruled that instrumental music was protected speech, and both had assumed the existence of a limited public forum. In order to rule in favor of the school district, the courts had to find there was no viewpoint discrimination. To do this the courts chose distinct paths to argue there was no such discrimination because the students simply had no point of view. The district court treated the performance of "Ave Maria" as a species of religious worship when, in fact, it was no such thing, and wrongly interpreted *Glover* to justify a blanket prohibition of all religious expression when in fact *Glover* explicitly stands

203. *Id.*

204. *Nurre v. Whitehead*, 520 F. Supp. 2d 1222, 1232 n.15 (W.D. Wash. 2007) (citation omitted).

205. *See Nurre*, 580 F.3d at 1087.

206. *Id.* at 1095 n.6.

207. *Id.* (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (emphasis added by the Ninth Circuit)).

for the permissible blanket exclusion of religious worship, but not religious commentary, in a limited public forum.²⁰⁸

On the issue of the constitutional distinction between religious worship and religious commentary, Judge Tallman was probably right, and *Glover* wrong. The Supreme Court has never adopted this distinction. It was Justice Stevens who, in a dissent from *Good News Club*, attached constitutional significance to the categories of religious discussion, religious worship, and proselytizing.²⁰⁹ But even Justice Stevens noted that “a public school that permitted its facilities to be used for the discussion of family issues and child rearing could not deny access to speakers presenting a religious point of view on those issues,”²¹⁰ and probably would have protected the musical performance of “Ave Maria” if he had construed the music as religious commentary.

The appellate court therefore rejected the district court’s reliance on *Glover*, choosing instead to assume that the only possible viewpoint involved in performing a work with a title such as “Ave Maria” was a religious one, and since the students disclaimed any intent to communicate a message about religion, there was no viewpoint that could have suffered discrimination. These positions, however, render nugatory the findings of both courts that instrumental music is protected expression under the First Amendment.²¹¹ It makes no sense to find that instrumental music is protected speech, and then deny any protection for such expression by finding that instrumental music has no viewpoint to protect. It would have been more logical to have found that instrumental music was not protected speech. But that, of course, would have contradicted the dicta of the Supreme Court and several circuits. The “no viewpoint” positions also rendered null the assumption both courts made that the school had established a limited public forum for the musical performance of the wind ensemble. If the music Nurre wished to perform had no viewpoint, what was the sense of finding there was any limited public forum for the performance of this music to begin with? It would have been more logical for the court to have found there was no limited public forum because the performance of music without a message has no viewpoint. But the courts did not take that line. The evidence and basic civil procedure indicated to the district court there was a genuine question of material fact as to whether the school had established a limited public forum. And the appeals court noted that the defendant did not contest the existence of a limited public forum. Finally, the contrived requirement that the music express a viewpoint such as an ideology, opinion, or perspective in order to deserve free speech

208. The district court’s interpretation of Nurre’s interest in performing “Ave Maria” as religious worship which has no First Amendment protection based on *Glover*, and, in the alternative, as expression lacking any religious message or viewpoint to be protected based on Nurre’s disclaimer, indicates that the district court had no consistent understanding of the musical performance. See *supra* notes 186–97 and accompanying text.

209. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 96, 130 (2001) (Stevens, J., dissenting) (citations omitted) (“Speech for ‘religious purposes’ may reasonably be understood to encompass three different categories. First, there is religious speech that is simply speech about a particular topic from a religious point of view Second, there is religious speech that amounts to worship, or its equivalent Third, there is an intermediate category that is aimed principally at proselytizing or inculcating belief in a particular religious faith.”).

210. *Id.* (citing *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393–94 (1993)).

211. See *supra* III(B)(i)–(ii).

protection was really a camouflage for the "particularized meaning" requirement, a proposition which Supreme Court precedent in *Johnson* and *Finley* and dicta in *Hurley* had long ago rejected.²¹²

The courts obviously did not think about any of this. They were not attentive to the nonrepresentational nature of music, which does not, *per se*, project a cognitive ideology or perspective, but rather presents an artistic expression to which the listener might or might not attach such cognitive ideas.²¹³ The courts failed to recognize that the students' expression possessed an artistic point of view to which judicial precedent had accorded full constitutional protection. By prohibiting the musical performance, the school was practicing viewpoint discrimination, not against a religious point of view, but rather against an artistic point of view. Referring to the music as merely "a pretty piece" doesn't change this.

ii. Reasonableness

The second requirement for the legality of government speech restrictions in a limited public forum is reasonableness. To be permissible, the school district's censorship of "Ave Maria" had to be reasonable in its exclusion of content that did not serve the purpose for which the limited public forum was established.²¹⁴ At the end of its discussion of the viewpoint element of the limited public forum analysis, the district court declared that the school district's decision to prohibit the performance of "Ave Maria" was not only viewpoint neutral but also reasonable on the basis of the "Establishment Clause Defense," so that there had been no constitutional violation of free speech.²¹⁵ However, the district court had not yet examined the reasonableness prong of the limited public forum test, but rather only announced it would do so in a subsequent section of the opinion.

The Court also finds, as discussed below in the context of an "Establishment Clause defense," that the prohibition on the performance of "Ave Maria" was reasonable in light of the purposes of the 2006 JHS graduation ceremony. *See* Section II.B.2.b, *infra*. As a result, under the forum analysis, the Court concludes that defendant's restriction was viewpoint neutral and reasonable. Accordingly, defendant did not violate plaintiff's rights under the Free Speech Clause of the First Amendment by prohibiting the performance of "Ave Maria" at the 2006 JHS graduation ceremony.²¹⁶

Section II.B.2.b deals with the defendants' qualified immunity defense.²¹⁷ Thus, rather than discuss the issue of the reasonableness of the speech restriction under its limited public forum analysis, the court elected to postpone its treatment of that issue to its discussion of the defendants' qualified immunity defense. But before

212. *See supra* notes 133–140 and accompanying text.

213. Jonassen, *supra*, note 25, at 757 ("The court's comments miss a crucial aspect of the case. Plaintiff's statement was evidence that she did not intend to express anything religious. But just because she did not have a religious viewpoint does not mean that she did not have a musical viewpoint.").

214. *See supra* notes 176 and 199 and accompanying text.

215. *Nurre*, 520 F. Supp. 2d at 1231–33.

216. *Id.* at 1232–33.

217. *Id.* at 1236–40.

discussing Whitehead's qualified immunity defense, the court also discussed reasonableness in regard to Nurre's Establishment Clause and Equal Protection Clause claims as well.²¹⁸

This Article focuses on the Free Speech issues in *Nurre*. However, the district court's analyses of Nurre's Establishment and Equal Protection claims and Whitehead's qualified immunity defense are all relevant to that issue because rather than discuss reasonableness under the reasonableness prong for government restrictions on speech in a limited public forum, the court dealt with the reasonableness of the school officials under these other issues, concluding, it appears, that if the school officials were reasonable for the purposes of these other issues, they were reasonable for the purposes of the limited public forum. In its discussion of these other issues of the Establishment Clause and Equal Protection claims and the Qualified Immunity defense, the district court supported its contention that the Everett School District officials acted reasonably on the basis of the Establishment Clause Defense.

a. Reasonableness: Establishment Clause and Equal Protection

1. The District Court

Nurre's Establishment Clause claim is unusual in that she was not arguing the school district was endorsing a religious belief with which she disagreed, or was preventing her from worshipping as she wished.²¹⁹ Rather, Nurre was arguing that by unreasonably excluding "Ave Maria" only because of its religious title, the school district was demonstrating a hostility to religion.²²⁰ The claim may have been ill-advised because it drew attention to religious expression, when the case was really about artistic expression.

In any event, the district court applied the *Lemon* test, the first prong of which requires the government action under review to have a secular purpose.²²¹ The court quoted *Vasquez v. Los Angeles County*, an opinion in which the Ninth Circuit

218. The court justified this shift in a footnote stating that an examination of "the graduation ceremony as a whole is relevant in evaluating the reasonableness of defendant's action in denying the performance of 'Ave Maria.'" *Id.* at 1232 n.16. The court relied upon *Glover*, 480 F.3d at 910, for this proposition. *Id.* The shift, however, obscures the distinction between the musical performance, which both courts assumed was a limited public forum, from the rest of the graduation ceremony, which did not enjoy that assumption. In another footnote, the court states that the school district's policies and procedures are not controlling because they refer to choral and musical assemblies, and not specifically to graduation ceremonies. *Id.* at 1233 n.17. The footnote does point out, "The only policy or procedure expressly addressing graduation states: 'Neither the District nor individual schools shall conduct or sanction invocations, benedictions or prayer at any school activities including graduation.'" *Id.* at 1233 n.17 (citing to Dkt. No. 10, Ex. 2 at 3). But, of course, an instrumental musical performance is not an invocation, benediction, and, though the music was composed to accompany the prayer, "Ave Maria," the performance of the music for its artistry alone, without the words of the prayer, is not a prayer.

219. *Id.* at 1234 (quoting *Vasquez v. Los Angeles Cty.*, 487 F.3d 1246, 1256 (9th Cir. 2007) (quoting *American Family Ass'n, Inc. v. City and Cty. of San Francisco*, 277 F.3d 1114, 1122 (9th Cir. 2002))) ("The Ninth Circuit has 'noted that "because it is far more typical for an Establishment Clause case to challenge instances in which the government has done something that favors religion or a religious group, [there is] little guidance concerning what constitutes a primary effect of inhibiting religion."").

220. *Id.*

221. *Id.* at 1233 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971)).

found Los Angeles County's removal of a cross from the county seal was not a violation of the Establishment Clause. "[T]o hold that the removal of . . . objects to cure an Establishment Clause violation would itself violate the Establishment Clause would . . . result in an inability to cure an Establishment Clause violation and thus totally eviscerate the [E]stablishment Clause."²²² The court then pointed to Whitehead's deposition testimony that in not allowing the performance of "Ave Maria" at graduation, she was relying on *Lee v. Weisman*, where the Supreme Court prohibited school officials from arranging for clergy to lead prayers at public high school graduations because that would be a coercive imposition of religion by the government on those attending the graduation, an Establishment Clause violation.²²³ Therefore, the court found that the purpose of prohibiting the performance of "Ave Maria" was to avoid this potential Establishment Clause violation, which is a secular purpose, so that the first prong of *Lemon* was satisfied.²²⁴

The court went on to argue that the prohibition did not violate the other two prongs of the *Lemon* test. The second prong prohibits "government action that has the 'principal or primary effect' of advancing or disapproving religion."²²⁵ Again relying on *Vasquez*, the court found that a "reasonable observer" familiar with the history and controversy surrounding religious speech at graduation exercises would not perceive the primary effect of the defendant's action as one of hostility toward religion. "Rather, it would be viewed as an effort by Defendant to comply with the Establishment Clause and to avoid unwanted future litigation."²²⁶

The third prong of *Lemon* provides that the government action must not foster an "excessive government entanglement with religion."²²⁷ The district court argued that "given plaintiff's stance on the lack of religious content of 'Ave Maria' . . . plaintiff cannot show that excessive entanglement occurred."²²⁸

The claim might be stronger if plaintiff believed that the performance of Biebl's "Ave Maria" conveyed a religious message. But she does not . . . Based on this, the plaintiff cannot take the position that defendant acted with hostility toward religion or the School District's action fostered 'excessive entanglement with religion' when plaintiff does not assert that the speech that was excluded conveyed a religious message.²²⁹

Thus, the district court thought that because Nurre had no religious message to convey, the government could not have been demonstrating any hostility against religion or fostering excessive entanglement with religion.

222. *Id.* at 1233–34 (quoting *Vasquez*, 487 F.3d at 1256 n.8).

223. "Q. Where did you obtain your information that the commencement was required to be a neutral setting? A. From the Supreme Court decision about commencement." [*Lee v. Weisman*, 505 U.S. 577 (1992)]. *Id.* at 1234 (citing Deposition upon Oral Examination of Carol Whitehead, *supra* note 43, at 34).

224. *Nurre*, 520 F. Supp. 2d at 1234. ("The Court finds that defendant's action was motivated by an effort to avoid a potential Establishment Clause violation.").

225. *Id.* (citing *Lemon*, 403 U.S. at 612).

226. *Id.* (quoting *Vasquez*, 487 F.3d at 1257).

227. *Id.* (quoting *Lemon*, 403 U.S. at 613).

228. *Id.* at 1234.

229. *Id.*

Again, there are defects in this argument. For one thing, the district court's finding of no religious intent in its discussion of the Establishment Clause overlooks the court's earlier treatment of the performance as if it were religious worship.²³⁰ Under its viewpoint analysis, the court treated the students' expression as religious worship in spite of their disclaimer of any religious intent, an approach which, in the court's view, undercut their free speech claim. For purposes of the Establishment Clause claim, the court took the disclaimer seriously as an indication that the students had no religious intent in their expression, which now undercut their Establishment Clause claim. For the court to earlier treat the performance as if it were a species of religious worship, and now find there was no government entanglement because the performance was not intended to be religious after all, appears inconsistent to say the least.

Another problem with this argument is its lack of attention to what a reasonable observer would understand about the performance. As the court itself indicated, the determination of whether the school district was expressing hostility towards religion depended on what a reasonable observer would understand from the prohibition of the performance, and not on what Nurre intended.²³¹ Indeed, the school officials banned the musical performance not on the basis of what was intended, but on the basis of what might be perceived due to the religious title of the music. But it was questionable whether a reasonable observer would have perceived the musical performance as government support of religion merely because of the music's name or origin. Banning the music because of its religious name, even though the music had no religious intent or message, could be unreasonable hostility to religion, one which excludes expression out of all reasonable proportion to its religious significance, regardless of what was intended and what could have been perceived.

In attempting to demonstrate the reasonableness of the school district's action of prohibiting the performance of Ave Maria, the district court relied on *Vasquez* in much the same way as it relied on *Glover*, and just as inappropriately. Once again, the district court chose a case that was clearly distinguishable from *Nurre*. *Vasquez* concerned an objection to the removal of a cross from the official Los Angeles County seal.²³² Such a seal is a representation of the authority of the county government.²³³ An official county seal could not be considered a limited public forum in which private speakers are allowed to contribute symbols of their choice. A county seal is more appropriately identified as no public forum at all, in which the government speaks by selecting the symbols with which the government

230. *Supra* notes 184–94 and accompanying text.

231. *See supra*, note 226 and accompanying text.

232. *Vasquez*, 487 F.3d at 1247–48.

233. Consider, for example, the significance of the county seal in *Robinson v. City of Edmund*, 68 F.3d 1226, 1228 (10th Cir. 1995): “Since 1965 the seal has been used extensively by the City, and appears on City limits signs, on City flags, on the uniforms of City police officers and firefighters, on official City vehicles, on stickers identifying City property, and in the City Council chambers. Additionally, the seal appears on each utility bill sent out by the City, as well as on official City stationery and the Utility and Sanitation Department’s newsletter. The seal has been registered as a trademark under Oklahoma law.”

represents its authority.²³⁴ The government may include or exclude any symbol it chooses.²³⁵ It is especially important in this type of forum that the government avoid expression supportive of a specific religion or religion in general in order not to violate the Establishment Clause.²³⁶ In *Vasquez*, a potential Establishment Clause violation hinged on the appearance of the cross, the most fundamental symbol of the Christian religion, on a county seal.²³⁷ Certainly in a nonpublic forum such as this where the government is speaking, there is a realistic danger that the community would think the municipality was endorsing a particular religion by including a cross; so the Ninth Circuit was justified in finding that a reasonable observer would not construe the removal of the cross to be an act of hostility towards religion, but rather conclude "[d]efendants' removal of the cross is more reasonably viewed as an effort to restore their neutrality and to ensure their continued compliance with the Establishment Clause,"²³⁸ especially because such crosses on municipal seals had recently been found unconstitutional.²³⁹ What may be a reasonable government prohibition in the forum which *Vasquez* addressed may not be a reasonable prohibition at all in the limited public forum assumed by the court in *Nurre*, in which students were allowed to choose the work of instrumental music they wished to perform. *Vasquez*, therefore, was not persuasive in demonstrating the reasonableness of the school district's prohibition.

While failing to distinguish *Vasquez*, the district court distinguished three cases involving religious music at a public school. In *Stratechuk v. Board of Education of South Orange-Maplewood School District*, the Third Circuit found that a complaint alleging a categorical school ban on exclusively religious music having the express purpose of sending a message of disapproval of religion states a claim and should not be dismissed.²⁴⁰ The district court, however, found the denial of a mo-

234. Cf. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 472 (2009) (citation omitted), which found that the monuments which the city government had selected for a public park were government speech: "In this case, it is clear that the monuments in Pleasant Grove's Pioneer Park represent government speech. Although many of the monuments were not designed or built by the City and were donated in completed form by private entities, the City decided to accept those donations and to display them in the Park. Respondent does not claim that the City ever opened up the Park for the placement of whatever permanent monuments might be offered by private donors. Rather, the City has 'effectively controlled' the messages sent by the monuments in the Park by exercising 'final approval authority' over their selection."

235. *Id.* at 467–68 (citations omitted) ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.").

236. *Id.* at 468 ("This does not mean that there are no restraints on government speech. For example, government speech must comport with the Establishment Clause.").

237. *Vasquez v. Los Angeles Cty.*, 487 F.3d 1246 (9th Cir. 2007); *Salazar v. Buono*, 559 U.S. 700, 725 (2010) ("The cross is of course the preeminent symbol of Christianity[.]").

238. *Vasquez*, 487 F.3d at 1257.

239. *Id.* (citing *Robinson*, 68 F.3d 1226, 1232 (10th Cir. 1995); *Harris v. City of Zion*, 927 F.2d 1401, 1413 (7th Cir. 1991); *Friedman v. Bd. of Cty. Comm'rs*, 781 F.2d 777, 778 (10th Cir. 1985); and *Murray v. City of Austin*, 947 F.2d 147, 163 (5th Cir.1991) (Goldberg, J., dissenting), *cert. denied*, 505 U.S. 1219, 112 S. Ct. 3028, 120 L.Ed.2d 899 (1992) (noting "constant . . . judicial disapproval of government use of Christian crosses . . . on municipal seals" and pointing out that "[t]he Supreme Court itself has repeatedly disapproved in dicta the governmental display of crosses").

240. 200 Fed. Appx. 91, 94 (3d Cir. 2006). In *Stratechuk v. Bd. of Educ., S. Orange-Maplewood Sch. Dist.*, 587 F.3d 597 (3d Cir.), *cert. denied*, 562 U.S. 828 (2009), the Third Circuit ruled that the school board's

tion to dismiss insufficient to apply to *Nurre* which concerned summary judgment.²⁴¹ In *Doe v. Duncanville Independent School District*, the Fifth Circuit found no Establishment Clause violation in the performance of a religious choral piece, "The Lord Bless You and Keep You," as the Choir Theme Song.²⁴² Rather, the Circuit stated that prohibiting or limiting the song's performance would "require hostility, not neutrality, toward religion. Such animosity towards religion is not required or condoned by the Constitution."²⁴³ Despite this dicta, the district court found this case irrelevant because it did not concern a "hostility to religion" claim as did *Nurre*, nor did *Duncanville* concern the graduation context.²⁴⁴ In *Bauchman for Bauchman v. West High School*, the Tenth Circuit found that the school choir's practice and performance of religious choral music even at religious sites did not offend the Establishment Clause.²⁴⁵ The district court distinguished this case because it also did not deal with the "hostility to religion" issue and the Tenth Circuit had granted an injunction against the performance of such music at the school's graduation pending appeal.²⁴⁶ However, the district court neglected to consider the Tenth Circuit's eventual finding, that the singing of the Choir Theme Song at graduation would not have been the kind of religious activity found in *Weisman*, so that it would not have entailed a state endorsement of religion in the context of a school graduation.²⁴⁷

policy of eliminating religious songs to celebrate the holiday season at school sponsored activities was constitutional. However, the policy did permit the performance of religious music that had an educational purpose, did not refer to the holidays, and tended to be in foreign languages such as Latin or Italian. Thus, songs such as "Joy to the World," "O Come All Ye Faithful," "Hark, the Herald Angels Sing," and "Silent Night" would not be permitted, but music such as Antonio Vivaldi's "Gloria in Excelsio" (sic for "Gloria in Excelsis Deo," that is, "Glory to God in the Highest"), Arcangelo Corelli's "Concerto VIII, fatto per note di natali" ("Concerto No. 8 composed for Christmas Eve"), a "Jubilate" (unidentified composition with the title of "Rejoice" that could refer to the birth of Christ), and "Agnus Dei/cum sanctis" ("Lamb of God/with the Saints" the "Lamb of God" is a prayer recited at the Catholic Mass) would be allowed. *Id.* at 602. Apparently, choral music that refers to the event Christmas celebrates, the birth of Christ, would be acceptable as long as the references occur in classical works in a foreign language and not in popular Christmas carols.

241. *Nurre v. Whitehead*, 520 F. Supp. 2d 1087, 1240 (9th Cir. 2009).

242. 70 F.3d 403 (5th Cir. 1995), *cert. denied*, 524 U.S. 953 (1998).

243. *Id.* at 407–08. "The argument that students likely identify their choir by its theme song is well taken but misses the crucial point that particularly in the world of choral music, singing about religion is not the same as endorsing or exercising religion. Students who identify DISD's choir with *The Lord Bless and Keep You* will certainly feel unity with past choirs from the same school but we are hard pressed to find that this unity necessarily stems from a common belief in Christianity or Judaism rather than the fact that the earlier students also attended the same high school." *Id.* at 408 n.8.

244. *Id.* at 1240.

245. 132 F.3d 542, 556 (10th Cir. 1997).

246. *Nurre*, 520 F. Supp. 2d at 1240 (quoting *Bauchman*, 132 F.3d at 547 n.4 ("Ms. Bauchman also requested an injunction pending appeal, which we granted, *thereby enjoining the singing of the two songs, 'The Lord Bless You and Keep You' and 'Friends' by the Choir at West High School's 1995 graduation ceremonies.*" (emphasis added by district court))).

247. *Bauchman*, 132 F.3d at 552, n.8 (stating in reference to the graduation exercise, "[W]e do not believe the singing of religious songs alone constitutes prayer The facts as alleged by Ms. Bauchman simply do not identify a religious activity analogous to that addressed in *Lee* or other school prayer cases. Accordingly, we conclude a coercion analysis is inapplicable to the facts at hand."). The Tenth Circuit thereby affirmed the district court's opinion distinguishing *Weisman* which was concerned with prayer at graduation and not music. *Bauchman* by and through *Bauchman v. West High School*, 900 F. Supp. 254, 268 (D. Utah 1995) ("Singing of songs is not an 'explicit religious exercise,' like the graduation prayer was deemed to be by the Supreme Court in *Lee v. Weisman*, or like other prayers and singing in cases cited by plaintiff. Music

These cases, though distinguishable on grounds far more tenuous than cases such as *Glover* and *Vasquez*, could nevertheless have been read as an indication that, generally speaking, religious music studied and performed for artistic or historical reasons is acceptable at events sponsored by a public school, including graduation. Consistent with those opinions, the Supreme Court has repeatedly indicated that the study of religion itself in public schools, to say nothing of the performance of religious music, passes constitutional muster.²⁴⁸ However, these cases did not persuade the district court that the performance of "Ave Maria" at the Jackson High School graduation might not have offended the Constitution, and were quickly dispatched.

In regard to the Equal Protection claim, the district court noted that Nurre was not claiming that the prohibition deprived her of a fundamental right or discriminated against her on the basis of a suspect classification. Rather, Nurre claimed that she "and her Wind Ensemble classmates were singled out for different treatment because, unlike previous senior classes, their choice of a performance piece at graduation was not allowed. This different treatment was not reasonable or rational."²⁴⁹ In support of her theory, Nurre relied on the Supreme Court's "class of one" equal protection jurisprudence.²⁵⁰ However, this theory only required rational scrutiny to justify the government's action. The court readily found a rational basis for the government's action in the school officials' concern that the performance of "Ave Maria" at graduation would be an Establishment Clause violation.

Perhaps the court was a bit hasty in concluding the school's action passed rational scrutiny. For several years, the Wind Ensemble of Jackson High School had presented graduation performances of "On a Hymnsong of Philip Bliss," an instrumental work by David R. Holsinger with many religious connections.²⁵¹ The term, "hymn" is plain English (as opposed to Latin) for "1(a): a song of praise to God; (b) a metrical composition adapted for singing in a religious service."²⁵² The particular

has a purpose in education beyond the mere words or notes in conveying a feeling or mood, teaching culture and history, and broadening understanding of art."). This is a clear distinction the courts in *Nurre* failed to recognize.

248. See, e.g., *Stone v. Graham*, 449 U.S. 39, 42 (1980) ("[T]he Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like."); *Edwards v. Aguillard*, 482 U.S. 578, 606–08 (1987) (Powell, J., concurring) ("As a matter of history, schoolchildren can and should properly be informed of all aspects of this Nation's religious heritage In fact, since religion permeates our history, a familiarity with the nature of religious beliefs is necessary to understand many historical as well as contemporary events. In addition, it is worth noting that the Establishment Clause does not prohibit per se the educational use of religious documents in public school education. . . . The [Bible] is, in fact, 'the world's all-time best seller' with undoubted literary and historic value apart from its religious content."); *Sch. Dist. of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 225 (1963) ("[O]ne's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.").

249. *Nurre*, 520 F. Supp. 2d at 1235 (citation omitted).

250. *Id.*

251. See *supra* note 33 and accompanying text.

252. *Hymn*, Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/hymn> (last visited Mar. 1, 2015). See *Nurre v. Whitehead*, 580 F.3d 1087, 1100 n.2 (9th Cir. 2009) (Smith, J., dissenting in part, concurring in judgment) ("In marked contrast to what was done in this case, in previous

term, “hymnsong,” was coined by the composer—Holsinger—for his compositions which make use of melodies derived from hymns.²⁵³ Philip Bliss was a nineteenth-century composer of hymns well-known in Christian musical circles.²⁵⁴ And David Holsinger is a contemporary composer who has written many musical works with Christian themes and is currently Composer and Director of the Wind Ensemble at Lee University, which describes itself as a Christ-Centered Liberal Arts University, located in Cleveland, Tennessee.²⁵⁵ Members of the audience would have been more likely to recognize the religious significance of “Hymnsong” than of the Latin title, “Ave Maria,” and those who were more knowledgeable would have known the many Christian aspects of this work.²⁵⁶ And if, in fact, the “Hymnsong” was chosen by the previous Director of the Wind Ensemble—Jim Rice—as he testified,²⁵⁷ the performance of this religious work at a public school graduation would have made a much better case for government endorsement of religion and an Establishment Clause violation than the performance of “Ave Maria,” since the former was chosen by a school official, which implies government approval of the religious expression, and the latter was chosen by students, which supports the existence of a limited public forum in which members of the public speak and not the government. The school district approved and allowed the “Hymnsong” for several years with no concern about an Establishment Clause violation, and then disapproved the “Ave Maria” for that very reason.²⁵⁸ This does not appear particularly rational.

2. The Appellate Court

The appellate court treated Nurre’s Establishment Clause and Equal Protection claims in much the same manner as the district court. Like Judge Lasnik, Judge

years the School District had condoned the ensemble’s playing a piece titled *On a Hymnsong by Phillip Bliss* at the school’s graduation ceremony.”).

253. E-mail to Frederick Jonassen from David R. Holsinger Conductor, Wind Ensemble, Lee University (August 29, 2008, 17:33 EDT) (on file with author) (“[‘Hymnsong’ is] just a term I made up to refer to my compositions based on hymn melodies.”).

254. Philip Bliss (1838 to 1876) “is the second most famous Christian song writer in history.” Ed Reese, *The Life and Ministry of Philip Bliss*, CHRISTIAN BIOGRAPHY, <http://www.wholesomewords.org/biography/biobliss.html> (last visited Mar. 1, 2018). His hymns include titles such as, *Dare to Be a Daniel*; *Hallelujah, ‘Tis Done!*; *Hallelujah, What a Savior!*; *Jesus Loves Even Me*; and many others. *Id.*

255. David R. Holsinger (b. 1945) is a composer who has written many musical works with Christian themes. See Dr. David R. Holsinger, *Biography*, <http://www.davidrholsinger.com> (last visited Mar. 1, 2018). His titles include *Liturgical Dances* and *The Easter Symphony*. *Id.* *About Lee University*, LEE UNIVERSITY, <http://www.leeuniversity.edu> (last visited Mar. 1, 2018).

256. Justice Alito points out that “*On a Hymnsong by Phillip Bliss*,” which the District had approved for several years, “not only includes the term ‘hymn’ in its title, [but] is an arrangement of Philip Bliss’ hymn ‘It is Well with My Soul’ that has fervently religious lyrics, including the following:

‘Though Satan should buffet, though trials should come,
Let this blest assurance control,
That Christ hath regarded my helpless estate,
And hath shed His own blood for my soul.’”

Nurre, 559 U.S. at 1027 n.2 (Alito, J., dissenting from denial of certiorari) (quoting SPAFFORD & BLISS, *It is Well with My Soul*, in *GOSPEL HYMNS* No. 2, p. 78 (P. Bliss & I. Sankey 1876)).

257. See *supra* note 31 and accompanying text.

258. Jonassen, *supra* note 25, at 761.

Tallman applied the *Lemon* test.²⁵⁹ He found the first prong satisfied as "an effort to avoid conflict with the Establishment Clause."²⁶⁰ Relying heavily on *Vasquez*, the appellate court, like the district court, found *Lemon*'s second prong satisfied because "a reasonable person . . . would understand that the action had the secular effect of maintaining neutrality and ensuring the District's continued compliance with the Establishment Clause."²⁶¹ On the third prong, the appellate court distinguished between two types of state entanglement in religious matters: administrative entanglement and political entanglement.²⁶² There was no administrative entanglement because the ban on religious music "occurred only once that year and was done merely by reviewing song titles for overtly religious references."²⁶³ There was no political entanglement because the record did not provide "any evidence that this policy caused political divisiveness," despite Nurre's objection and that of the other students.²⁶⁴ Regarding Nurre's equal protection claim, the appellate court found that the school district's action passed rational-basis review because the "requirement that all musical selections be secular was a reasonable action taken to avoid confrontation with the Establishment Clause."²⁶⁵ Thus, the appellate court found it rational, even reasonable, for the school district to ban the music to avoid the appearance of government support of religion to a reasonable observer, even though the court had found Nurre to have had no religious message at all under its viewpoint analysis.

3. Comments on the Establishment Clause and Equal Protection Analyses

What is most troubling about the treatment both courts afforded Nurre's claims is that the courts put Nurre in a double bind. The double bind originated from Whitehead's conundrum argument, that Nurre's claims fail whether she had a religious message or not.

Ms. Nurre now finds herself in a legal conundrum. She has stated that the senior members of the wind ensemble did not intend to convey any particular point by playing "Ave Maria" during graduation. Thus, she cannot genuinely argue that her free speech rights have been violated. On the other hand, if she now admits that the music was intended to convey a message, it was reasonable for the District to conclude that such message was religious in nature, given the title and origins of the piece, "Hail Mary."²⁶⁶

Of course, this argument is specious because it misstates what Nurre said. She said she had no *religious* message; she did not say she had no message at all. This

259. *Nurre*, 580 F.3d at 1095–97.

260. *Id.* at 1096.

261. *Id.* at 1097.

262. *Id.*

263. *Id.* at 1098.

264. *Id.*

265. *Nurre*, 580 F.3d at 1099.

266. Appellee's Answering Brief at 14–15, *Nurre v. Whitehead*, 580 F.3d 1087 (9th Cir. 2009) (No. 07-35867).

leaves open the possibility of an *artistic* message entitled to constitutional protection. Whitehead's argument that, if Nurre had a religious message, she loses under the Establishment Clause defense, and if she had no religious message, she loses her Free Speech claim, because she had no viewpoint to protect, is a bit of logical chicanery that is defensible as client advocacy. It is not defensible on the part of the courts to tacitly adopt this reasoning, and apply it even more subtly and effectively.

Whitehead's argument at least seems to concede that either Nurre had a religious message or not. What the courts did was to find that Nurre *both had no message at all* for purposes of deciding the viewpoint prong of the limited forum analysis, *and had a religious message* for purposes of deciding whether the school officials had an Establishment Clause defense for all the other claims and for the qualified immunity defense.

The district court found Nurre had no message by treating her musical performance as a form of worship as in *Glover*.²⁶⁷ The appellate court, rejecting this questionable distinction, treated her performance as simply having no viewpoint at all.²⁶⁸ Therefore, there was no viewpoint discrimination. The district court also found that Nurre's performance would have projected a religious message so that the school district's prohibition was reasonable under the Establishment Clause defense.²⁶⁹ But when it came to Nurre's own Establishment Clause claim, the district court accepted Nurre's disclaimer of no religious intent in order to nullify her allegation that the state had shown hostility to religion.²⁷⁰

The appellate court, after stating its view that Nurre had no message at all in a footnote, nevertheless saddled her with a religious message perceptible to the reasonable observer in using the Establishment Clause defense to dismiss Nurre's Establishment Clause and Equal Protection claims.²⁷¹ Without having to refer to any "conundrum" or "dilemma," both courts placed Nurre's case in a double bind by ignoring her artistic message and assigning to it either no message at all, which took care of the viewpoint prong on her free speech claim, or a religious message, which took care of everything else. With this kind of manipulative reasoning, there was no way Nurre could win on anything. That is the real conundrum of the case.

b. Qualified Immunity and Reasonableness

The district court, at the outset of this section, announced its belief that, pursuant to the *Saucier* test for qualified immunity, the court had shown the school district did not violate any of Nurre's constitutional rights.²⁷² Of course, the court had not really shown this in regard to the free speech claim because the court had not addressed the reasonableness prong for government restrictions of speech in a

267. Nurre v. Whitehead, 520 F. Supp. 2d 1222, 1232 (W.D. Wash. 2007).

268. Nurre, 580 F.3d at 1095.

269. Nurre, 520 F. Supp. 2d at 1232–40.

270. Id. at 1235.

271. Nurre, 580 F.3d at 1095–99.

272. Nurre, 520 F. Supp. 2d at 1236 ("Although the Court's conclusion above that plaintiff's constitutional rights were not violated entitles Dr. Whitehead to qualified immunity as an individual defendant, for the record, the Court also grants defendant's motion for summary judgment on qualified immunity for the separate reason that it was not clearly established that defendant's actions were unlawful.").

limited public forum, which the court said it would treat in this selfsame Section II.B.2.b, on qualified immunity.²⁷³ Be that as it may, the court found under the *Saucier* test that, besides not having violated any of Nurre's constitutional rights, Whitehead was also entitled to qualified immunity.²⁷⁴ Judge Lasnik noted the Supreme Court's statement in *Malley v. Briggs* that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."²⁷⁵ This is the standard the district court would apply in deciding the reasonableness of the school district's Establishment Clause defense for purposes of qualified immunity.²⁷⁶

Judge Lasnik began by quoting from several Supreme Court cases which affirmed student free speech but left open the possibility that avoidance of an Establishment Clause violation may provide a compelling reason to suppress such speech.²⁷⁷ In *Lamb's Chapel v. Center Moriches Union Free School District*, the Supreme Court observed, as it did in the earlier *Widmar v. Vincent*, that the State's interest "in avoiding an Establishment Clause violation 'may be [a] compelling' one justifying an abridgment of free speech otherwise protected by the First Amendment."²⁷⁸ In *Good News Club v. Milford Central School*, the Court stated, "[I]t is not clear whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination."²⁷⁹ In all these cases—*Widmar*, *Lamb's Chapel*, and *Good News Club*—the Supreme Court did not reach the issue because, under the facts presented, the Court found "there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed."²⁸⁰ This, of course, implies that the Establishment Clause defense justifies

273. *Id.* at 1232–33.

274. *Id.* at 1236.

275. *Id.* (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

276. *Id.* at 1236–40.

277. *Id.* at 1236–37.

278. *Nurre*, 520 F. Supp. 2d at 1237 (quoting *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993)).

279. *Id.* (quoting *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 113 (2001)).

280. *Id.* (quoting *Good News Club*, 533 U.S. at 113). The full quotation from *Good News Club* reads as follows:

We rejected Establishment Clause defenses similar to Milford's in two previous free speech cases, *Lamb's Chapel* and *Widmar*. In particular, in *Lamb's Chapel*, we explained that "[t]he showing of th[e] film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members." 508 U.S. at 395, 113 S. Ct. 2141. Accordingly, we found that "there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed." *Ibid.* Likewise, in *Widmar*, where the university's forum was already available to other groups, this Court concluded that there was no Establishment Clause problem. 454 U.S. at 272–273, and n. 13, 102 S. Ct. 269.

The Establishment Clause defense fares no better in this case. As in *Lamb's Chapel*, the Club's meetings were held after school hours, not sponsored by the school, and open to any student who obtained parental consent, not just to Club members. As in *Widmar*, Milford made its forum available to other organizations. The Club's activities are materially indistinguishable from those in *Lamb's Chapel* and *Widmar*. Thus, Milford's reliance on the Establishment Clause is unavailing.

Good News Club, 533 U.S. at 113. The passage is a strong indication that the existence of a limited public forum is a weighty factor against construing what is said in the forum as bearing the imprimatur of the government and thereby violating the Establishment Clause.

government limitations on speech only when the prohibited speech could realistically convey an endorsement of religion and create an Establishment Clause violation.

The district court then declared that although the question of “‘whether a State’s interest in avoiding an Establishment Clause violation would justify viewpoint discrimination’ is an open one,” for the Supreme Court,²⁸¹ “[t]he question . . . is not an open one in the Ninth Circuit.”²⁸² “The Ninth Circuit has recognized that Establishment Clause concerns can justify speech restrictions ‘in order to avoid the appearance of government sponsorship of religion.’”²⁸³ For this proposition, the court cited *Cole* and *Lassonde v. Pleasanton Unified School District*, both Ninth Circuit cases that concerned proselytizing student speeches at public high school graduations.²⁸⁴ This Article will address these cases more fully below.²⁸⁵

The court argued that in the graduation context, the performance of “Ave Maria” would have appeared to be the school district’s speech and not the private speech of the plaintiff or the Wind Ensemble.²⁸⁶ The court cited *Hazelwood v. Kuhlmeier* for the proposition that a public school may exercise control over student speech in school-sponsored activities where members of the public might reasonably believe that the student’s speech bears the imprimatur, or approval, of the school.²⁸⁷ Brandsma and Whitehead had made the point reflected in *Weisman* that graduation ceremonies are particularly sensitive school-sponsored activities because students who may not want to be subjected to religious messages nevertheless feel compelled to attend this once-in-a-lifetime event.²⁸⁸ Supporting the notion that schools are responsible for whatever is said at a school-sponsored event, the court underscored the control school administrators usually exercise over graduations, quoting the Supreme Court’s *Weisman* opinion, “[a]t high school graduation, teachers and principals must and do retain a high degree of control over the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of the students.”²⁸⁹ Judge Lasnik then quoted the Ninth Circuit in *Cole*, “[T]he District’s plenary control over the graduation ceremony, especially the student speech, makes it apparent [that the sectarian] speech would have borne the imprint of the District”;²⁹⁰ and in *Lassonde*: “[T]he essence of graduation is to place the school’s imprimatur on the ceremony—including the student speakers that the

281. *Nurre*, 520 F. Supp. 2d at 1237 (quoting *Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d 1044, 1053 (9th Cir. 2003)).

282. *Id.*

283. *Id.*

284. *Id.* (citing *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092 (9th Cir. 2000)).

285. See *infra* Sections III(D)(ii)(b)(2).

286. *Nurre*, 520 F. Supp. 2d at 1237–38 (“[G]iven the graduation context, the Wind Ensemble’s performance of ‘Ave Maria’ would have appeared to be the School District’s speech not the ‘private speech’ of the plaintiff or the Wind Ensemble.”).

287. *Id.* (citing *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 271 (1988)).

288. For Brandsma, see Plaintiff *Nurre*’s Motion for Summary Judgment, *supra* note 34, at 5, and accompanying text; for Whitehead, see Deposition Upon Oral Examination of Dr. Carol Whitehead, *supra* note 43, at 33–34, and accompanying text.

289. *Nurre*, 520 F. Supp. 2d at 1238 (alteration in original) (quoting *Lee v. Weisman*, 505 U.S. 577, 597 (1992)).

290. *Id.* (quoting *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1103 (9th Cir. 2000)).

school selected."²⁹¹ Because of this control over student speech at a graduation ceremony, the *Lassonde* court stated in regard to *Cole*, "[T]he school district had to censor the [sectarian] speech in order to avoid the appearance of government sponsorship of religion"; and "allowing the speech would have had an impermissibly coercive effect on dissenters, requiring them to participate in a religious practice even by their silence."²⁹² Judge Lasnik concluded:

[T]he Court finds that the Wind Ensemble's performance of "Ave Maria" would have borne the imprimatur of the school because the performance took place at graduation, the School District exercised control over the performance by placing restrictions on its content, and the performance was by the "Jackson Band" as listed in the 2006 JHS graduate program.²⁹³

Judge Lasnik never quite states that the performance of "Ave Maria" would have been an Establishment Clause violation. He did not formally apply the *Lemon* test, endorsement test, or coercion test to the hypothetical performance of "Ave Maria" at the Jackson High graduation. However, in stating the "finding" that the performance would have borne the "imprimatur" of the school, Judge Lasnik was employing language indicating the performance would have satisfied Justice O'Connor's endorsement test and that he would have found an Establishment Clause violation if the issue were before the Court. Judge Lasnik then went on to argue for qualified immunity, applying the "plainly incompetent" and "in knowing violation of the law" standard.

Given the Ninth Circuit's precedent in *Cole* and *Lassonde*, and in the light of the district's Establishment Clause concerns, the Court cannot say that the contours of plaintiff's rights in the context of a graduation ceremony were "sufficiently clear" that the defendant would understand that by prohibiting the performance of "Ave Maria" defendant was knowingly violating the law. . . . Therefore, the Court cannot say that defendant was "plainly incompetent" or "knowingly violate[d] the law" by assuming that her actions restricting "Ave Maria" were proper under the Establishment Clause. For this reason, the Court concludes that defendant as an individual is entitled to qualified immunity on plaintiff's free speech claim.²⁹⁴

Although the district court conceded that the "conflict" with the Establishment Clause was much greater in *Cole* and *Lassonde*,²⁹⁵ nevertheless, in regard to the performance of "Ave Maria," the Court found enough of a conflict to quote Justice Blackmun's concurrence in *Weisman*, "[T]he Supreme Court has stated that '[t]he Establishment Clause proscribes public schools from conveying or attempting to convey a message that religion or a particular religion is favored or preferred.'"²⁹⁶

291. *Id.* (quoting *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 985 (9th Cir. 2003)).

292. *Id.* (quoting *Lassonde*, 320 F.3d at 983 (citing *Cole*, 228 F.3d at 1101)).

293. *Id.* (citations omitted).

294. *Nurre*, 520 F. Supp. 2d at 1238–39 (citations omitted) (emphasis added).

295. *Id.* at 1239.

296. *Id.* (quoting *Lee v. Weisman*, 505 U.S. 577, 604–05 (1992) (Blackmun, J., concurring) (emphasis in original)).

The district court's apparent dicta, that the performance of "Ave Maria" would have been an Establishment Clause violation, is remarkable. This was a musical performance, not a prayer, not proselytizing, not a religious message. Not to recognize that was to exit the realm of reality. The dicta contradicts case law from other circuits which found that school-sponsored student performances of music, even music with religious lyrics, for non-religious purposes do not convey an endorsement of religion or constitute Establishment Clause violations.²⁹⁷ The court's dicta also contradicts Supreme Court dicta approving the study of religion itself in the public schools for artistic and historical purposes.²⁹⁸ Finally, the facts of this case are far removed from *Weisman*. The performance of "Ave Maria" was not a prayer. School authorities did not select and arrange this music. It did not convey a religious message. None of the reasons justifying the prohibition in *Weisman* are present in *Nurre*. The court's approval of the imposition of a ban on all religious music, in fact, appears unmindful of *Weisman*'s balanced and nuanced teaching:

A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution. We recognize that, at graduation time and throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students.²⁹⁹

It is not surprising that the appellate court did not follow the district court in basing the reasonableness of the prohibition exclusively on the Establishment Clause defense, and pointedly declined to make any finding that the performance of "Ave Maria" could have resulted in an Establishment Clause violation.³⁰⁰ It should also be no surprise that the district court's conclusion depends on numerous defects in reasoning.

In shifting the discussion of reasonableness from the opinion's discussion on the limited public forum issue to the section discussing qualified immunity, the district court effectively weakened the reasonableness standard that should have been applied. By means of this move, the judge avoided discussing whether the complete exclusion of any religious reference from the wind ensemble's performance was a reasonable limitation of content for purposes of preserving the purpose of the limited public forum. Instead the court applied the reasonableness standard for qualified immunity in which the government action would be acceptable as long as it was not "plainly incompetent" or in "knowing[] violat[ion of] the law."³⁰¹ Moreover, this minimal standard of reasonableness was to be applied to the Establishment Clause defense, the standard for which the district court also weakened.

In a footnote, the court acknowledged that under Ninth Circuit law, the Establishment Clause defense "does not apply unless the school district proves that the

297. See *supra* notes 240–247 and accompanying text.

298. See *supra* note 248.

299. *Weisman*, 505 U.S. at 598–99 (citations omitted).

300. See *infra* notes 344–346 and accompanying text.

301. *Nurre v. Whitehead*, 520 F. Supp. 2d 1222, 1236, 1239 (W.D. Wash. 2007).

Establishment Clause would have been violated had the activity at issue been allowed to proceed³⁰² and quoted *Hills v. Scottsdale Unified School District, No. 48* for this proposition.³⁰³ In that case, a school district prohibited the distribution of religious pamphlets in what the court found to be a limited public forum.³⁰⁴ The school district pled the Establishment Clause defense.³⁰⁵ But because "[t]he District [did] not . . . demonstrate[] that the Establishment Clause would be violated if it had permitted distribution of literature that advertised religious programs or events,"³⁰⁶ the Ninth Circuit ruled that the school district's prohibition discriminated against the plaintiff's viewpoint.³⁰⁷ The district court also quoted *Cole v. Oroville Union High School District*, a Ninth Circuit case in which the school district prohibited student speakers from delivering proselytizing speeches at graduation.³⁰⁸ "[I]t is clear the District's refusal to allow Cole to deliver a sectarian invocation as part of the graduation ceremony was necessary to avoid an Establishment Clause violation."³⁰⁹ Thus, Ninth Circuit precedent indicated that a school district that justifies the prohibition of speech in a limited public forum on the basis of the Establishment Clause defense must prove that allowing the speech would have caused an Establishment Clause violation. Judge Lasnik, however, simply chose not to follow this clear precedent and fashioned his own standard:

If the Establishment Clause "defense" is to provide any meaningful shelter for a school district, . . . the defense should not depend on a hindsight determination by the court, but rather on the reasonableness of the school district's belief at the time that an activity would violate the Establishment Clause.³¹⁰

It is not clear why the Wind Ensemble's performance would not be an Establishment Clause violation in hindsight when a court makes a determination, and yet would appear to be a violation at the time of the activity. Moreover, it seems that the district court arranged its analysis so that this "reasonableness" was to be based not on whether there was a realistic possibility of an Establishment Clause violation, but under the plainly incompetent or in knowing violation of the law standard for qualified immunity.

Thus, by analyzing reasonableness under the issue of qualified immunity, the district court reduced in two ways what Whitehead would need to show to justify the banning of "Ave Maria" within a limited public forum. Whitehead would not need to show that banning "Ave Maria" from graduation was necessary to avoid an actual Establishment Clause violation, which was Ninth Circuit law. Instead, she would only have to show that her belief that the performance *might* have violated

302. *Id.* at 1237 n.20.

303. *Id.* (quoting *Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d 1044, 1053 (9th Cir. 2003)).

304. *Hills*, 329 F.3d at 1049.

305. *Id.* at 1053.

306. *Id.*

307. *Id.* at 1056 ("When the District denied Hills access to the school's limited public forum, it discriminated against him because of religious viewpoint in violation of the Free Speech Clause of the First Amendment.").

308. *Nurre v. Whitehead*, 520 F. Supp. 2d 1222, 1237 n.20 (W.D. Wash. 2007) (quoting *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1102 (9th Cir. 2000)).

309. *Id.*

310. *Id.*

the Establishment Clause was reasonable. Secondly, that belief would be reasonable as long as the court could not find Whitehead to be plainly incompetent or acting in knowing violation of the law. Not only was this standard applied to the qualified immunity defense, but it appears it was used to satisfy the reasonableness prong of the test for government speech restrictions in a limited public forum. What should have been a discussion of whether the school district was reasonable in its blanket exclusion of any religious reference in order to preserve the purpose of the limited public forum became a discussion of whether Whitehead was plainly incompetent or in knowing violation of the law for excluding "Ave Maria" in order to avoid a remotely possible violation of the Establishment Clause. Applying such a feeble standard facilitated the court's finding that the school administrators acted reasonably regarding Nurre's Free Speech claim.³¹¹

Ironically, Whitehead did not argue, let alone prove, that the performance of "Ave Maria" would have been a violation of the Establishment Clause, and seemed quite willing to concede it would not have been. The defense argued that Whitehead was not required to allow the performance of "Ave Maria" whether or not it would have been such a violation:

In theory, Nurre may be correct that allowing "Ave Maria" would have been constitutional. But this argument is a non sequitor. Simply because the Establishment Clause allows some display of religion does not mean it requires the same. Applied to the present case, even if the District could constitutionally allow "Ave Maria" to be played at a high school graduation does not mean it was required to do the same.³¹²

Because the district court assumed that there was a limited public forum, this argument was spurious. If the school district had established a limited public forum, it could only prohibit speech on a reasonable and non-viewpoint-discriminatory basis. It could not prohibit speech for no reason at all or just because it wanted to.

The reader may recall that for purposes of viewpoint analysis, the district court treated the performance of "Ave Maria" as a religious service or worship.³¹³ However, in its analysis of Nurre's Establishment Clause claim, the district court treated the performance as non-religious because of Nurre's disclaimer of any religious intent.³¹⁴ But now, for the purposes of analyzing reasonableness in regard to the Establishment Clause defense, the district went back to treating the performance as a religious service or message once again.³¹⁵ Perhaps the nonrepresentational character of instrumental music, which could invite a variety of different meanings, was responsible for the chameleon-like form which presented itself to the perception of the district court. However, the court could have avoided this troubling inconsistency by perceiving the music as an artistic statement, and not religious.

311. See *Nurre*, 520 F. Supp. 2d at 1233, 1239.

312. Defendant's Motion for Summary Judgment, *supra* note 30 (citations omitted).

313. *Nurre*, 520 F. Supp. 2d at 1231–32.

314. *Id.* at 1233–1235.

315. *Id.* at 1233–40.

In order to find qualified immunity, it was not necessary for the district court to also suggest the performance of "Ave Maria" would have been government endorsement of religion. The court could have found that Whitehead was entitled to qualified immunity under the "plainly incompetent" or in "knowing[] violat[ion of] the law" standard because of the complex and unsettled state of the governing law. The court could have made that finding and also found that it was unreasonable to ban the music for the purposes of the limited public forum because the ban did not meet the higher standard of reasonableness for restrictions of speech in a limited public forum. There was no need to argue that the performance of "Ave Maria" would have resulted in a constitutional violation. Much of the district court's reasoning was also irrelevant. Under *Hazelwood*, for example, a graduation ceremony is a school-sponsored activity in which student speech is subject to school regulation.³¹⁶ But the district court had assumed that the school had created a limited public forum for the performance of the Wind Ensemble;³¹⁷ in which case *Hazelwood* does not apply.³¹⁸ If, as the district court and the appellate court assumed, the school had established a limited public forum when the school had allowed the students to choose the music they would play at graduation, then the speech of the students was not school-sponsored, and the school district could only regulate the speech to the extent that its limitations were reasonable and not discriminatory of viewpoint.³¹⁹ If there were any question whether members of the audience might think the musical expression was school-sponsored, Jackson High School could have made it clear that the students' musical expression was their own and not the school's, as Catherine Ross suggests in her book, *Lessons in Censorships: How Schools and Courts Subvert Students' First Amendment Rights*.³²⁰ "The performance guide could have indicated that the players chose the piece and the criterion they used, or a member of the group could have made an announcement to the same effect before the group began to play."³²¹ If, in the minds of school officials, the performance of "Ave Maria" realistically presented a potential Establishment

316. See *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 276 (1988).

317. *Nurre*, 520 F. Supp. 2d at 1231; *Nurre*, 580 F.3d at 1094. See Reply Brief of Petitioner for Writ of Certiorari, *Nurre v. Whitehead*, 559 U.S. 1025 (2010) (No. 09-671), 2010 WL 28540 ("In upholding the school's decision to forbid the publication of student articles, this Court made clear in *Hazelwood* that it was not addressing principles that apply to a public forum for expression. Nor did *Hazelwood* involve the kind of limited public forum for expression that both lower courts determined existed in this case." (citations omitted)).

318. See *Hazelwood*, 484 U.S. at 267–70 (finding that the student newspaper was not a public forum).

319. *Nurre*, 580 F.3d at 1094 ("In a nonpublic forum opened for a limited purpose, restrictions on access 'can be based on subject matter . . . so long as the distinctions drawn are reasonable in light of the purpose served by the forum' and all the surrounding circumstances."). *Nurre*, 520 F. Supp. 2d at 1231 ("But, even if the Wind Ensemble's performance constitutes a 'limited public forum,' defendant's prohibition on the performance of 'Ave Maria' is not a violation of plaintiff's free speech rights if the restriction is viewpoint neutral and reasonable in light of the purpose of the forum." (citations omitted)).

320. See *supra* note 25.

321. *Id.* at 266.

Clause violation, a disclaimer could have made clear that the school was not endorsing religion.³²² Of course, such a disclaimer by itself may not have dispelled an actual Establishment Clause violation.³²³ However, there simply wasn't any.

1. Prayer and Proselytizing vs. Musical Performance

Perhaps the most clearly inappropriate precedents Judge Lasnik cited in his opinion were *Cole* and *Lassonde* in support of the Establishment Clause defense. These two cases are obviously distinguishable from *Nurre*. In both, students wanted to deliver graduation speeches containing proselytizing language or sectarian references.³²⁴ *Cole* concerned two students, John Niemeyer and Ferrin Cole, who were to deliver the valediction and invocation respectively at the Oroville Union High School graduation.³²⁵ The Ninth Circuit described their speeches as follows:

Niemeyer's proposed speech was a religious sermon which advised the audience that "we are all God's children through Jesus Christ [sic] death, when we accept his free love and saving grace in our lives," and requested that the audience accept that "God created us" and that man's plans "will not fully succeed unless we pattern our lives after Jesus' example." Finally, Niemeyer's speech called upon the audience to "accept God's love and grace" and "yield to God our lives." Cole's proposed invocation referred repeatedly to the heavenly Father and Father God, and concluded "We ask all these things in the precious holy name of Jesus Christ, Amen."³²⁶

In *Lassonde*, the Ninth Circuit exemplified the proposed proselytizing speech with the following passage from that speech:

322. In *Rosenberger*, the Supreme Court found that the University of Virginia's program of funding the publications of student groups constituted a limited public forum, and applying the rules of such a forum, the Court found the University's exclusion of a religious student group's publication to be prohibited viewpoint discrimination. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 844 (1995). A factor in the Court's reasoning was the disclaimer, which the University required the student groups to include in their written materials "stating that the [student organization] is independent of the University and that the University is not responsible for the [student organization]." *Id.* at 823. The Court argued, "The distinction between the University's own favored message and the private speech of students is evident in the case before us. The University itself has taken steps to ensure the distinction in the agreement each [student organization] must sign. The University declares that the student groups eligible for [] support are not the University's agents, are not subject to its control, and are not its responsibility." *Id.* at 834-35.

323. *Establishment Clause – Religious Displays on Public Property – Colorado Supreme Court Upholds Display of Ten Commandments on Public Property*. – *State v. Freedom from Religion Foundation*, 898 P.2d 1013 (Colo. 1995) (*en banc*), 109 HARV. L. REV. 530, 533 (1995) ("Courts at all levels . . . have indicated that signs disclaiming endorsement of a display's religious meaning may lessen or even cure Establishment Clause violations, but no court has yet sought to establish the presence of a disclaimer as more than just one of many factors to be weighed.").

324. See *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979 (9th Cir. 2003); *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092 (9th Cir. 2000).

325. *Cole*, 228 F.3d at 1095.

326. *Id.* at 1097.

I urge you to seek out the Lord, and let Him guide you. Through His power, you can stand tall in the face of darkness, and survive the trends of "modern society."

As Psalm 146 says, "Do not put your trust in princes, in mortal men, who cannot even save themselves. When their spirit departs, they return to the ground; on that very day their plans come to nothing. Blessed is he whose help is the God of Jacob, whose hope is in the Lord his God, the Maker of heaven and earth, the sea, and everything in them—the Lord, who remains faithful forever. He upholds the cause of the oppressed and gives food to the hungry. The Lord sets prisoners free, the Lord gives sight to the blind, the Lord lifts up those who are bowed down, the Lord loves the righteous. The Lord watches over the alien and sustains the fatherless and the widow, but he frustrates the ways of the wicked."

... "For the wages of sin is death; but the gift of God is eternal life through Jesus Christ our Lord." Have you accepted the gift, or will you pay the ultimate price?³²⁷

In *Weisman*, the Supreme Court prohibited public schools from arranging for outside clergy to lead others in prayer at graduations,³²⁸ and in *Santa Fe*, the High Court prohibited public schools from arranging, even indirectly, for students to lead prayers at football games.³²⁹ In *Cole* and *Lassonde*, the Ninth Circuit held that, like government arranged prayer, student prayer and proselytizing at graduation "would have constituted District coercion of attendance and participation in a religious practice because proselytizing, no less than prayer, is a religious practice."³³⁰ The inclusion of such speech at a public school graduation "would have constituted government endorsement of religious speech," and "lent [the School] District approval to the religious message of the speech," and "carried the District's seal of approval."³³¹

What all these cases have in common is the finding of state endorsement of religion and Establishment Clause violations because the State was either imposing,

327. *Lassonde*, 320 F.3d at 981.

328. *Lee v. Weisman*, 505 U.S. 577, 599 (1992) ("The sole question presented is whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform. No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment.").

329. *Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290, 316 (2000) ("[T]he simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation."). In *Nurre*, however, the school did not allow the students to choose the music they would perform with the purpose of including prayer at the graduation and did not in any way select or influence the selection of "Ave Maria." *Nurre v. Whitehead*, 580 F.3d 1087 (9th Cir. 2009).

330. *Cole*, 228 F.3d at 1104. The *Lassonde* court found that case indistinguishable from *Cole*. "Our decision in *Cole* squarely controls Plaintiff's case. The facts are almost identical." *Lassonde*, 320 F.3d at 983. "[T]here is no question that a reasonable dissenter could have felt that silence signified approval or participation. Even if the school district could have conducted the proceedings so as to avoid the appearance of governmental 'entanglement' with Plaintiff's speech, it had no means of preventing the coerced participation of dissenters attending their graduation ceremony other than censoring Plaintiff's speech." *Id.* at 984.

331. *Cole*, 228 F.3d at 1103.

causing to be imposed, or allowing to be imposed, a religious practice—either prayer or sermon-like proselytizing speech—on an audience. In contrast, the performance of “Ave Maria” at the Jackson High School graduation was neither a prayer nor an effort to proselytize or sermonize. Whereas *Cole* and *Lassonde* involved the censorship of explicit, particularized religious messages, the instrumental music at issue in *Nurre* by its very nature could not have conveyed any particularized religious message at all. The essential difference between the speeches and prayers in *Cole*, *Lassonde*, *Weisman*, and *Santa Fe* on the one hand, and the musical performance in *Nurre* on the other, was that the former were religious rituals while the latter was an artistic event. Contrary to the district court’s suggestion that *Cole* and *Lassonde* presented a “conflict” with the Establishment Clause that was greater in *degree* than the “conflict” presented by *Nurre*,³³² the difference between the expression in the prior cases and the expression in *Nurre* presented a difference in *kind*, so that even though the speeches in *Cole* and *Lassonde* might indeed have presented violations of the Establishment Clause, the music in *Nurre* could not.

2. Limited Public Forums vs. Plenary Control

However appropriate the decisions in *Cole* and *Lassonde* may have been, these particular cases present a problem in their reasoning which later infects and consumes the district court’s reasoning in *Nurre*. As noted above, the district court fashioned its argument on the basis that the performance of “Ave Maria” would have conveyed an endorsement of religion by the school.³³³ The argument begins with *Hazelwood*’s proposition that a school may exercise control over student speech at a school-sponsored event in which the speech might reasonably be understood to have the imprimatur or approval of the school.³³⁴ The district court then cited *Weisman*, *Cole*, and *Lassonde*, for the idea that if a school exercises “plenary” control over a school-sponsored event such as a graduation, it is reasonable for the audience to construe student speech as having the endorsement of the school.³³⁵ Finally, “because the performance took place at graduation, the School District exercised control over the performance by placing restrictions on its content, and the performance was by the ‘Jackson Band’ as listed in the 2006 JHS graduate program,” it was reasonable to understand the performance of a religiously inspired and named musical work to be an approval of religion.³³⁶ Because the school’s approval of religion would create an Establishment Clause violation, the school officials were reasonable in prohibiting the performance, if not required to do so.³³⁷

But there is a logical defect in this argument. Before developing its “plenary control” analysis, the *Cole* opinion states, “Even assuming the Oroville graduation ceremony was a public or limited public forum, the district’s refusal to allow the students to deliver a sectarian speech or prayer was necessary to avoid violating the Establishment Clause under the principles applied in *Santa Fe Independent*

332. *Nurre v. Whitehead*, 520 F. Supp. 2d 1222, 1239 (W.D. Wash. 2007).

333. *Id.* at 1233–40.

334. *See supra* note 287 and accompanying text.

335. *See supra* notes 289–293 and accompanying text.

336. *Nurre*, 520 F. Supp. 2d at 1238.

337. *Id.* at 1233–40.

School District v. Doe and *Lee v. Weisman*.”³³⁸ For one thing, the statement is questionable because neither the *Weisman* nor the *Santa Fe* courts were dealing with a limited public forum. Be that as it may, the *Cole* court was saying that even if it assumed the student speeches were within a limited public forum, they were impermissible because they would have created an Establishment Clause violation. This indicates that the reasoning in *Cole* implicitly, or perhaps hypothetically, took into account the assumption that the students’ speeches were within a limited public forum. But in *Nurre*, the district court, and later the appellate court, explicitly assumed that the performance of the Wind Ensemble was a limited public forum. Under that assumption, it is not logical to say that the school still exercises “plenary” or complete and absolute control of the school event, at least not in regard to the expressive area of the limited public forum.³³⁹ This is because in establishing the limited public forum, the school has yielded at least some control of the speech within this area of the limited public forum, evidenced by the requirement that government limitations on speech be viewpoint neutral and reasonable. To assume the State has created a limited public forum, but then also say that the State maintains plenary control, is self-contradictory. Either there is a limited public forum in which the State is subject to limitations on its control of speech, or there is plenary government control, but not both. If a court assumes that the school has created a limited public forum within its graduation exercises, it is irrelevant that the school reviews the speeches or has control over all other aspects of the graduation ceremony, unless the court is considering these facts as evidence that there is no limited public forum to begin with. Thus, in *Nurre*, when the district court applies the plenary control argument, the court has, in effect, ignored or abandoned its assumption that there is any limited public forum at all.

At the heart of the plenary control argument is circular reasoning. It goes like this. The court must decide whether the students’ speeches may be censored or not. Because the school censors the speech, a reasonable observer would conclude the school endorses the speech it does allow. Because a reasonable observer would conclude the school endorses the speech it allows, the school must censor the speech it does not endorse. Without the intermediate steps, the logic is that the school must censor student speech because it censors student speech. Instead of asking whether the school may censor the speech within the assumed limited public forum, this reasoning posits the fact of censorship as conclusive that censorship is permissible, even required. As Caleb McCain observed in respect to *Cole*, “it is a tautology to require censorship to prevent unconstitutional speech that derives its unconstitutionality from that very censorship.”³⁴⁰

In a very odd footnote, the district court states, “Although the Court considers the parties’ forum analysis assertions, as the Court discusses in Section II.B.2.b below, based on Ninth Circuit authority, a forum analysis is not required to determine the viability of an Establishment Clause defense where the speech at issue bears

338. *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1101 (9th Cir. 2000).

339. The Merriam-Webster Online Dictionary, defines plenary as “complete in every respect: absolute, unqualified.” *Plenary*, MERRIAM-WEBSTER DICTIONARY (last updated Mar. 27, 2018), <https://www.merriam-webster.com/dictionary/plenary>.

340. Caleb McCain, *Chalk Talk – Religion in the Valedictory*, 37 J. L. & EDUC. 135, 138–39 (2008).

the imprimatur of the school.”³⁴¹ The court then provides the passage from *Cole* quoted above, stating that even if it is assumed that the school had created a limited public forum, it was necessary for the school to disallow student speech which would violate the Establishment Clause.³⁴² The statement is odd because if there was a limited public forum, as the court assumed, then the speech within that forum would not bear the imprimatur of the school. But if it is the case that the court thought forum analysis was unnecessary because the speech bore the imprimatur of the school, the court’s forum analysis had no purpose. All that was necessary for the court to do was to find that the Establishment Clause defense was viable because allowing the speech would produce government endorsement of religion and an Establishment Clause violation. Why Judge Lasnik undertook a forum analysis which he suggests was unnecessary is unclear. In any event, the concurrent assumption of a limited public forum and finding of plenary control does not indicate that the forum analysis is unnecessary; instead, what this indicates is that the court’s reasoning is defective if not incoherent.

c. The Appellate Court’s Discussion of Reasonableness

As noted above, the appeals court adopted the same limited public forum test accepted by the district court, which meant that the speech restriction imposed had to be “reasonable in light of the purpose served by the forum and all the surrounding circumstances.”³⁴³ However, the appellate court did not base its own finding of reasonableness upon the Establishment Clause defense.³⁴⁴ Unlike Judge Lasnik, Judge Tallman very clearly denied that the appellate court was making any finding or suggestion as to whether the performance of “Ave Maria” would have violated the Establishment Clause.³⁴⁵ “[W]e . . . wish to make clear that we do not hold that the performance of music, even ‘Ave Maria,’ would necessarily violate the Establishment Clause.”³⁴⁶

The appellate court opted to address the reasonableness standard, as it should, in terms of the government’s purpose in creating the limited public forum: “The ‘reasonableness’ analysis focuses on whether the limitation is consistent with preserving the property for the purpose to which it is dedicated.”³⁴⁷ The court concluded, “[T]he District’s action in keeping all musical performances at graduation ‘entirely secular’ in nature was reasonable in the light of the circumstances surrounding a high school graduation, and therefore did not violate Nurre’s right to free speech.”³⁴⁸ The circumstances which made the prohibition reasonable related to the desire to avoid the controversy that attended the performance of “Up Above My Head” at the previous year’s graduation.³⁴⁹ “Here, the District was acting to

341. *Nurre*, 520 F. Supp. 2d at 1229 n.10.

342. *Id.* See *supra* note 338 and accompanying text.

343. *Nurre v. Whitehead*, 580 F.3d 1087, 1094 (9th Cir. 2009) (citation omitted).

344. *Id.* at 1098.

345. *Id.*

346. *Id.*

347. *Id.* at 1094 (citation omitted).

348. *Id.* at 1095 (footnote omitted).

349. *Nurre*, 580 F.3d at 1091.

avoid a repeat of the 2005 controversy by prohibiting any reference to religion at its graduation ceremonies."³⁵⁰

To legally support the avoidance of "controversy" as a reasonable basis for prohibiting the performance of Ave Maria at graduation, the appellate opinion cited several cases in which courts had decided that a school district's concerns for disturbance and controversy were legitimate reasons for the school to restrict speech in a limited public forum.³⁵¹ The court cited *DiLoreto v. Downey Unified School District Board of Education*, in which the Ninth Circuit found that restricting advertisements on a high school baseball park fence for the purpose of avoiding disturbance and controversy was legitimate because the audience included impressionable youths in a school setting.³⁵² The appellate opinion also cited *Brody ex rel. Sugzdinis v. Spang*, which noted that a consent-decree provision restricting a student's proselytizing speech at graduation might be a valid restriction even when the valedictorian speech is considered a limited public forum.³⁵³ Finally, the court cited *Student Coalition for Peace v. Lower Merion School District Board of School Directors*, which held that banning the use of school facilities for an anti-nuclear exposition was reasonable to avoid political controversy and maintain the school's appearance of neutrality.³⁵⁴ The Ninth Circuit majority then found that the Everett School District, like the school authorities in the cited cases, acted to avoid a controversy, such as that which occurred following the 2005 graduation, by prohibiting any reference to religion at the 2006 graduation, such as the title, "Ave Maria."³⁵⁵

The Ninth Circuit's shift from the Establishment Clause defense to an avoidance of controversy defense as a justification for the school district's action is significant. Either the majority thought that the performance of "Ave Maria" at a public school graduation could not have posed any realistic danger of an Establishment Clause violation, or believed that finding such a realistic danger as a basis for censoring the music in *Nurre* was questionable and could be overruled by the Supreme Court. Certainly, the controversy rationale provided a more straightforward argument to satisfy the reasonableness prong of the test for speech restrictions in a limited public forum than did the arguments of the district court. However, this argument fails just as clearly. Although the Supreme Court denied certiorari so that the argument did not undergo further scrutiny,³⁵⁶ the controversy rationale drew substantial criticism from the concurrence of Judge Smith and dissent of Justice Alito.³⁵⁷

350. *Id.* at 1095.

351. *Id.* at 1094.

352. *Id.* (citing *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 967 (9th Cir. 1999)).

353. *Id.* (citing *Brody ex rel. Sugzdinis v. Spang*, 957 F.2d 1108, 1122 (3d Cir. 1992)).

354. *Id.* (citing *Student Coal. for Peace v. Lower Merion Sch. Dist. Bd. of Sch. Dirs.*, 776 F.2d 431, 437 (3d Cir. 1985)).

355. *Nurre*, 580 F.3d at 1095.

356. *Nurre v. Whitehead*, 559 U.S. 1025 (2010).

357. *Id.*

Smith, who issued a concurrence to the Ninth Circuit opinion, distinguished the cases which the majority cited.³⁵⁸ Rather than delay presenting these distinctions to the section on Smith's concurrence below, these distinctions are presented forthwith. *DiLoreto* concerned the placement of a large banner advertising the Ten Commandments on school property, and *Brody ex rel. Sugzdis v. Spang* was about a student's evangelizing speech at graduation, both attempts at explicit proselytization.³⁵⁹ *Student Coalition for Peace* concerned a large politically partisan rally that would advocate denuclearization to achieve world peace and had the potential of generating controversy and disruption at the school.³⁶⁰ However, the performance of "Ave Maria," Smith argued, was not proselytizing and could not have caused the controversy or disruption created by the previous year's performance of "Up Above My Head" because the performance was to be completely instrumental and not contain references to the Lord or heaven, let alone Jesus Christ or any other words that would advocate controversial ideas.³⁶¹ No proselytizing religious or political message could have been conveyed.³⁶²

Aside from Judge Smith's points, the Ninth Circuit neglected to note that in the *Student Coalition for Peace* case, the Third Circuit found that the district court did not consider whether the school district had created a limited public forum and remanded the case in order to make this determination.³⁶³ The district court found that while the school district had not created a limited public forum for the athletic field, it did create such a forum for the school gymnasium, and therefore the court enjoined the school district from prohibiting the student group from using the school gym, despite the potential for controversy.³⁶⁴ Because the *Nurre* courts assumed that the Wind Ensemble's performance was a limited public forum, *Student Coalition for Peace* ultimately supports *Nurre's* position that banning a student group from a limited public forum merely because of an unsubstantiated potential controversy is a constitutional violation.

358. *Nurre*, 580 F.3d at 1099 (Smith, J., concurring).

359. *Id.* at 1101.

360. *Id.*

361. *Id.* ("Unlike in *Student Coalition for Peace*, the wind ensemble's playing of *Ave Maria* here would not have risked creating a disruption or generating appreciable controversy . . . the playing of the *Ave Maria* arrangement could not have reasonably been interpreted to convey a religious message, nor was any such message intended. Rather, as *Nurre* stated, it was simply 'a pretty piece.' She further explained that, 'it's the kind of piece that can make your graduation memorable because we actually learned to play it really well. And we wanted to play something that we enjoyed playing.' For this reason, unlike as in *DiLoreto*, the performance would not have been viewed as proselytizing; as stated, the arrangement contains no words at all.").

362. *Id.*

363. *Student Coal. for Peace v. Lower Merion Sch. Dist. Bd. of Sch. Dirs.*, 766 F.2d 431, 443 (3d Cir. 1985) ("[T]he [Equal Access] Act should be read to apply only if a limited open forum existed after the Act became law. Since the trial in this case took place before the Act's effective date, there was no opportunity to offer evidence of the school's policy after that date. On remand, the appellants should have the opportunity to prove that the appellees' policy or practice *after* August 11, 1984 with respect to noncurricular student groups created a limited open forum broad enough to include the contemplated use.").

364. *Student Coal. for Peace v. Lower Merion Sch. Dist. Bd. of Sch. Dirs.*, 633 F. Supp. 1040, 1043 (E.D. Pa. 1986) ("Pennypacker Field is not a limited open forum The L[ower] M[erion] S[chool] D[istrict] has created a limited open forum at the Boys' Gym. . . . I find that it is appropriate here to enjoin the LMSD from denying the use of the Boys' Gym to the S[tudent] C[coalition for] P[peace] . . .").

As to "controversy," it is true that Superintendent Whitehead and Associate Superintendent Brandsma spoke of complaints and "letters" of complaint sent to the *Herald*, the largest newspaper in Sonomish County, from those who attended the 2005 graduation performance of the Kirk Franklin song, "Up Above My Head."³⁶⁵ But the record of this case documented only one letter of complaint that appeared in the *Herald*.³⁶⁶ Surely, if there were a serious controversy over the Jackson High School Choir's 2005 performance of "Up Above My Head," the defense would have produced more letters and affidavits from offended parties.

The author of the one letter complained about the references to God in lyrics sung by the Choir and expressed "puzzlement" about the efficacy of the school's "civic instruction" regarding "the importance of our national and state constitutions specifically relating to policy regarding religious activity, while willfully disregarding the same by sponsorship of nonsecular entertainment during a public graduation ceremony."³⁶⁷ Adopting a mocking tone, the letter-writer went on to state, "[i]f in fact the lesson was to demonstrate the meaning of hypocrisy, an 'A' grade should be awarded."³⁶⁸ This author appears to consider it self-evident that any mention of God in a government-sponsored forum, even in a musical performance, is a violation of the Constitution. While expressing disdain for the teachers and administrators who permitted the performance of "Up Above My Head," the letter certainly does not present a reasoned argument for this position. There is no mention of school policies, limited public forum analysis, Supreme Court cases, or any of the other subtleties that attend this complex issue. But most importantly, the letter is irrelevant to the issue of "Ave Maria," for the letter concerned the performance of a choral piece containing explicit references to God, which the letter writer may have thought was selected by the school.³⁶⁹

Presumably, the author of the letter was present at the 2005 graduation when the Wind Ensemble played "On a Hymnsong," by Phillip Bliss, with all of the religious trappings that work presented.³⁷⁰ Yet the author did not complain about the "Hymnsong." In fact, for several years the Wind Ensemble had played the "Hymnsong," which its former director, Mr. Rice, had selected,³⁷¹ and yet the defense produced no evidence of protest or controversy over it, even though the religious background of this work is at least as evident as that of "Ave Maria."³⁷² Nor is there a hint of any threat of lawsuits by individuals or organizations, like the ACLU or Americans United for Separation of Church and State, over religious music at the Jackson High School graduation. It is far from clear that the letter's author or anyone else would have objected to the performance of student-selected instrumental music whose religious title could have been omitted from the program altogether. Indeed, the "controversy" objection to "Ave Maria" doesn't work any better than the "Establishment Clause defense" objection treated earlier. Given this history, was it

365. See *supra* notes 44–45 and accompanying text.

366. See *supra* notes 45–46 and accompanying text.

367. *Supra* note 46 and accompanying text.

368. *Id.*

369. *Id.*

370. See *Nurre v. Whitehead*, 520 F. Supp. 2d 1222, 1225 (W.D. Wash. 2007).

371. *Id.*

372. See discussion *supra* Section III(D)(ii)(a)(1), in particular notes 251–256.

rational to attach a rather minor controversy concerning the words of a religious song performed by the School Chorus to the instrumental works performed by the Wind Ensemble that had never attracted any controversy at all? One extremely cranky letter about the Chorus does not a controversy make about the Wind Ensemble.

The Ninth Circuit was also concerned with the prospect of a captive audience subjected to an obviously religious work.³⁷³ The appellate court distinguished the graduation from a musical concert by arguing:

[W]hen there is a captive audience at a graduation ceremony, which spans a finite amount of time, and during which the demand for equal time is so great that comparable non-religious musical works might not be presented, it is reasonable for a school official to prohibit the performance of an obviously religious piece.³⁷⁴

Here the Ninth Circuit overlooked several issues of fact aside from the question of whether there would be any real controversy at all about the music performed by the Wind Ensemble. Any one of these issues of fact could have precluded summary judgment. For instance, it was not a certainty that the audience would have recognized the Latin name, "Ave Maria," as indicative of a religious piece of music.³⁷⁵ The court also overlooked the evidence that a good deal of other secular music was played at the graduation, so that the audience was not subjected to exclusively "religious" music. Aside from the Wind Ensemble's performance, there were six numbers performed by the Jazz Combo: a recording of "Pomp and Circumstance" played twice, the national anthem sung by a graduating senior, and the School Chorus's performance of "Mother Africa," not to mention student speeches.³⁷⁶ The court also seemed to have forgotten its finding that because Nurre had no religious motive in wanting to perform "Ave Maria," she therefore had no religious viewpoint protected by the First Amendment.³⁷⁷ It seems contradictory simultaneously to argue that a work, which had no viewpoint to protect, nevertheless would be controversial because of its viewpoint. Finally, it is also questionable that a public high school concert audience is any less captive than a graduation ceremony audience, an issue to be discussed below.³⁷⁸

The failure of the Ninth Circuit to examine evidence of the likely controversy and the other circumstances that allegedly made it reasonable for the school to

373. See *Nurre v. Whitehead*, 580 F.3d 1087, 1095 (9th Cir. 2009).

374. *Id.*

375. Neither the school administrators who decided to prohibit the performance, nor Nurre herself, were certain about exactly what the religious significance of the title was. See *supra* notes 56–58 and accompanying text.

376. See Petition for Writ of Certiorari, at 10, *supra* notes 45 and 81–85 and accompanying text. Incidentally, as the Petition points out at *10 n.4, "There are also lyrics to 'Pomp and Circumstance' which include repeating twice the following phrase, 'God who made thee mighty, Make thee mightier yet.'" See Perrine, *supra* note 25, at 185 (noting that "Pomp and Circumstance" is associated with the coronation of Edward VII, which marked both his ascension to the role of king and to the Head of the Church of England).

377. *Nurre*, 580 F.3d at 1095 n.6. ("[T]his is not a case involving viewpoint discrimination Nurre concedes that she was not attempting to express any specific religious viewpoint, but that she sought only to 'play a pretty piece.'"). See also *supra* notes 206–207 and accompanying text.

378. See *infra* notes 427–430.

prohibit the performance of "Ave Maria" are particularly striking in the light of *Tinker v. Des Moines Independent Community School District*, where the Supreme Court emphasized the need for courts to assess a school's claim of disruption and disorder to its educational mission as a basis for limiting or punishing student speech.³⁷⁹ While the day-to-day environment and circumstances at school are different from those of the graduation ceremony, the issue of curtailing student speech on the basis of disturbance and controversy is the common element between *Tinker* and the rationale upon which the Ninth Circuit rested its holding in *Nurre*.³⁸⁰ In *Tinker*, school officials punished students who wore black armbands at school to express their opposition to the war in Vietnam because the school claimed the expression of protest would be disruptive to school discipline.³⁸¹ On this question, the Supreme Court made it clear that unsubstantiated claims of disorder do not justify limitations on student speech. "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."³⁸² The Court continued:

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained.³⁸³

Because the *Tinker* Court found no "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises [had] in fact occurred," the Court ruled in favor of the students.³⁸⁴ The Ninth Circuit should have

379. 393 U.S. 503, 508 (1969).

380. In *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272–73 (1988), the Supreme Court differentiated between the free speech rights students have at school-sponsored events as opposed to their rights of personal expression in school. ("Accordingly, we conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." (footnotes omitted)).

381. On December 16, Mary Beth and Christopher wore black armbands to their schools. John Tinker wore his armband the next day. They were all sent home and suspended from school until they would come back without their armbands. They did not return to school until after the planned period for wearing armbands had expired—that is, until after New Year's Day.

Tinker, 393 U.S. at 504.

The district court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. *Id.* at 508. Because of the lack of evidence that the armbands were likely to cause such a disturbance, the Supreme Court reversed.

382. *Id.* at 508.

383. *Id.* at 509 (citation omitted).

384. *Id.* at 514.

given the factual record some consideration rather than uncritically accept the school administrators' claims of controversy.³⁸⁵

E. The Concurrence and the Dissent

i. Judge Milan D. Smith, Dissenting in Part, but Concurring in the Judgment

Judge Smith joined in the judgment of the Ninth Circuit panel because he agreed that Whitehead was entitled to qualified immunity.³⁸⁶ Judge Smith also thought along with the majority that the school's restriction was viewpoint neutral.³⁸⁷ But he forcefully argued that Whitehead's prohibition was not reasonable "in the light of the purpose served by the forum," so that the restriction failed the limited public forum test.³⁸⁸

I would hold that, in prohibiting Nurre and her classmates from playing their selected piece of music, the School District misjudged the Establishment Clause's requirements and, in so doing, violated Nurre's First Amendment rights. I am concerned that, if the majority's reasoning on this issue becomes widely adopted, the practical effect will be for public school administrators to chill—or even kill—musical and artistic presentations by their students in school-sponsored limited public fora where those presentations contain any trace of religious inspiration, for fear of criticism by a member of the public, however extreme that person's views may be.³⁸⁹

Smith's major concern was that the majority's ruling would lead to the inhibition of student expression and cause the nation's youth to become "Philistines, who have little or no understanding of our civic and cultural heritage."³⁹⁰

Aside from distinguishing the case law the majority relied upon for its "controversy" rationale, Smith pointed to "the far-reaching influence of religion and religious institutions on music."³⁹¹ He cited *Doe v. Duncanville* for testimony that "60-75 percent of serious choral music is based on sacred themes or text,"³⁹² and he quoted a law review article stating, "[A]pproximately forty-four percent of the music recommended by the Music Educators National Conference for inclusion in the public school curriculum—for the secular purpose of preserving 'America's vast and

385. See Petition for Writ of Certiorari, *supra* note 45, at 14 ("In *Tinker* . . . , this Court made clear that student speech may not be censored based simply on 'an urgent wish to avoid the controversy which might result from the expression.' Writing for the Court, Justice Fortas declared that the 'mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint' is simply not sufficient without more to censor student speech." (citation omitted)).

386. *Nurre v. Whitehead*, 580 F.3d 1087, 1102 (9th Cir. 2009) (Smith, J., dissenting in part, but concurring in judgment).

387. *Id.* at 1100.

388. *Id.*

389. *Id.* at 1099 (citation omitted) (footnote omitted).

390. *Id.*

391. *Nurre*, 580 F.3d at 1100 (Smith, J., dissenting in part, but concurring in judgment).

392. *Id.* (citing *Doe v. Duncanville*, 70 F.3d 403, 407 (5th Cir. 1995)) ("It is undisputed that much of the music composed in the Western World during the musical eras known as the medieval, baroque, and classical periods was fostered by one or more of the major European Christian denominations.").

varied music heritage'—has religious significance."³⁹³ He also enumerated classical and modern works and popular music which, though originally inspired by religion, have become secularized: Handel's *Hallelujah Chorus* from *The Messiah*, Steffan and Ward Howe's *The Battle Hymn of the Republic*, Beethoven's *Ode to Joy*, Mozart's *Requiem Mass in D Minor*, and even Purvis and Black's *When the Saints Go Marching In*.³⁹⁴ He argued that if the purpose of the graduation ceremony was to acknowledge the achievements of the graduating seniors by providing an opportunity for them to express themselves through speech and music, purging the ceremony of all vestiges of religion did not advance this purpose, but rather, given the religious influence on music, had just the opposite effect of curtailing the students' ability to demonstrate their achievements through their artistic expression.³⁹⁵ The prohibition was therefore unreasonable since it did not advance the very purpose of the limited public forum.

As discussed above, Smith found no legal grounds for banning the performance because of the potential that it would cause controversy, distinguishing the cases of *DiLoreto*, *Brody ex rel. Sugzdinis*, and *Student Coalition for Peace*.³⁹⁶ Moreover, Judge Smith argued that unlike these cases, "the playing of the "Ave Maria" arrangement could not have reasonably been interpreted to convey a religious message, nor was any such message intended," and "the performance would not have been viewed as proselytizing [because] the arrangement contains no words at all."³⁹⁷

Nor, according to Smith, did this case present grounds for the "Establishment Clause defense," which would only be available if the school district's "refusal to allow the students to [perform "Ave Maria"] is necessary to avoid violating the Establishment Clause," a proposition for which Judge Smith cited several cases including *Cole*, *Weisman*, and *Santa Fe*, which the district court and the majority had actually used in support of their reasoning.³⁹⁸ Under *Lassonde*, Smith noted, a school district may be obligated to censor a religious message for two reasons: (1) "to avoid the appearance of government sponsorship of religion"; and (2) to avoid "imper-

393. *Id.* (citing Richard Collin Mangrum, *Shall We Sing? Shall We Sing Religious Music in Public Schools?*, 38 CREIGHTON L. REV. 815, 866 (2005)).

394. *Id.* Nurre also points out that a great deal of modern popular music with religious references might also be excluded under the reasoning of the Ninth Circuit's opinion.

Students who perform rock-and-roll or pop tunes are likely to encounter problems. The Beatles sang about 'Mother Mary' in *Let It Be*. *Stairway to Heaven* by Led Zeppelin, *The Prayer* by Celine Dion, and *Living on a Prayer* by Jon Bon Jovi all contain allusions to religion in their titles.

Petition for Writ of Certiorari, *supra* note 45, at 29.

395. *Nurre*, 580 F.3d at 1100–01.

396. *Id.* at 1101 (citing *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 967 (9th Cir. 1999); *Brody v. Spang*, 957 F.2d 1108, 1122 (3d Cir. 1992); *Student Coal. for Peace v. Lower Merion Sch. Dist. Bd. of Sch. Dirs.*, 776 F.2d 431, 437 (3d Cir. 1085)).

397. *Id.* at 1101.

398. *Id.* (quoting *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1101 (9th Cir. 2000) (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992)).

missibly coerc[ing] . . . dissenters, requiring them to participate in a religious practice even by their silence.”³⁹⁹ Judge Smith found neither reason present.⁴⁰⁰ In Smith’s opinion, it was unlikely that many people would recognize “Ave Maria” as an “obviously religious piece” and a “well known Catholic prayer” when Superintendent Whitehead herself “only had a vague sense that the term had some religious origin.”⁴⁰¹ “Simply allowing the playing of a student-selected instrumental piece of classical music (with a title in a dead language whose meaning would be unrecognizable to most attendees of the graduation) cannot reasonably be construed as ‘government sponsorship of religion.’”⁴⁰² Likewise, Smith argued, merely attending a graduation in which one of several musical pieces is “an obscure classical piece” cannot constitute “participat[ing] in a religious practice.”⁴⁰³ While there is a compelling government interest “in not committing *actual* Establishment Clause violations,” the government has no legitimate interest in “discriminating against religion in whatever other context it pleases, so long as it claims some connection, however attenuated, to establishment concerns.”⁴⁰⁴

Judge Smith closed with an expression of sympathy for school officials who are subject to criticism and lawsuits regardless of what they do.⁴⁰⁵ But he also expressed the need for the courts to provide guidance in order to alleviate confusion, discourage litigation, and enhance student expression, something which the *Nurre* majority, in explicitly making no finding on whether the performance of “Ave Maria” would have been an Establishment Clause violation, conspicuously failed to do.⁴⁰⁶

ii. Justice Alito’s Dissent to Denial of Certiorari

In his dissent to the Supreme Court’s denial of certiorari, Justice Alito began by declaring, “The Ninth Circuit’s decision in this case is not easy to square with our free speech jurisprudence.”⁴⁰⁷ Unlike Judge Smith, Alito made it clear he thought there was an issue regarding viewpoint discrimination in this case.⁴⁰⁸ Alito distinguished *Nurre* from situations where “a public school administration speaks for itself and takes public responsibility for its speech.”⁴⁰⁹ In such instances the school “may say what it wishes without violating the First Amendment’s guarantee of freedom of speech.”⁴¹⁰ However, when the school allows students to make their own

399. *Id.* (citing *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 983 (9th Cir. 2003); *Cole*, 228 F.3d at 1101, 1104)).

400. *Id.*

401. *Nurre*, 580 F.3d at 1102.

402. *Id.*

403. *Id.*

404. *Id.* (quoting *Locke v. Davey*, 540 U.S. 712, 730 n.2 (2004) (Scalia, J., dissenting) (emphasis in original)).

405. *Id.*

406. *Id.*

407. *Nurre v. Whitehead*, 559 U.S. 1025, 1026 (2010) (Alito, J., dissenting from denial of certiorari).

408. See *infra* note 420 and accompanying text.

409. *Nurre*, 559 U.S. at 1028.

410. *Id.* (citing *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467–68 (2009)). Justice Alito, of course, was the author of the *Summum* decision. In that case, a religious organization, Summum, brought a section 1983 action against the City of Pleasant Grove because the City denied Summum permission to

choice of music to perform, school administrators "must respect the students' free speech rights . . . [and] not behave like puppeteers who create the illusion that students are engaging in personal expression when in fact the school administration is pulling the strings."⁴¹¹ Citing the Supreme Court school access cases *Rosenberger* and *Widmar*, Justice Alito asserted that a limited public forum is created when a public school purports to allow students to express their own views.⁴¹² In a limited public forum, he went on, "the State 'must not discriminate against speech on the basis of viewpoint,'"⁴¹³ and cited the other school access cases, *Good News Club* and *Lamb's Chapel* as well as *Rosenberger*.⁴¹⁴

Justice Alito particularly paused over the footnote in which the majority of the Ninth Circuit panel asserted that this was not a case of viewpoint discrimination because Nurre had "'concede[d] that she was not attempting to express any specific religious viewpoint' but instead 'sought only to "play a pretty piece."'"⁴¹⁵ Alito found this reasoning "questionable at best"⁴¹⁶ because: (1) the appellate court's holding "[did] not appear to depend in any way on petitioner's motivation" in selecting the piece.⁴¹⁷ "Nothing in the body of the court's opinion suggests that its decision would have come out the other way if petitioner had favored the Biebl piece for religious rather than artistic reasons."⁴¹⁸ And (2) the school district banned the piece precisely because of its perceived religious message, "that members of the audience would view the performance . . . as the district's sponsorship of [religion]."⁴¹⁹ Alito stated, "Banning speech because of the view that the speech is likely to be perceived as expressing seems to me to constitute viewpoint discrimination."⁴²⁰

erect a stone monument containing the "Seven Aphorisms of Summum" in a park in which a similar monument containing the Ten Commandments already stood. As in his dissent in *Nurre*, Alito set out the distinction between a forum in which tradition or government designation permits private speech, and a forum in which the government exercises its own right to speak.

If petitioners [the City of Pleasant Grove] were engaging in their own expressive conduct, then the Free Speech Clause has no application. The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny"); ("Government is not restrained by the First Amendment from controlling its own expression"). A government entity has the right to "speak for itself." "[I]t is entitled to say what it wishes," and to select the views that it wants to express ("It is the very business of government to favor and disfavor points of view.").

Summum, 555 U.S. at 467–68, 470 (citations omitted). Finding that "Permanent monuments displayed on public property typically represent government speech," the Court ruled in favor of the City: "In sum, we hold that the City's decision to accept certain privately donated monuments while rejecting respondent's is best viewed as a form of government speech. As a result, the City's decision is not subject to the Free Speech Clause, and the Court of Appeals erred in holding otherwise." *Id.* at 481.

411. *Nurre*, 559 U.S. at 1028.

412. *Id.* (citing *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829–30 (1995); and *Widmar v. Vincent*, 454 U.S. 263, 272–73 (1981)).

413. *Id.* (quoting *Good News Club v. Milford Central School*, 533 U.S. 96 (2001)).

414. *Id.*

415. *Id.* at 1029 (quoting *Nurre*, 580 F.3d at 1095 n.6).

416. *Id.*

417. *Id.*

418. *Nurre*, 559 U.S. at 1029.

419. *Id.*

420. *Id.*

Justice Alito suggested that he also disagreed with the notion that the censorship of Ave Maria could be justified by a reasonableness rationale based on the possibility that the performance could have generated unwanted controversy.⁴²¹ Alito cited other cases supporting his statement that the Supreme Court had “categorically reject[ed] the proposition that speech may be censored simply because some in the audience may find that speech distasteful,” including the student speech cases, *Board of Education Island Trees Union Free School District No. 26 v. Pico* and *Tinker*.⁴²² Alito perceived what he called a “tension” between this case law and the Ninth Circuit’s holding that after creating a limited public forum the public school could ban a performance of a religious piece of music because it might offend some members of a “captive audience at a graduation ceremony.”⁴²³ Like Judge Smith, Alito was concerned with the implications of the decision for the “nearly 10 million public school students in the Ninth Circuit.”⁴²⁴ He agreed with Judge Smith that the Ninth Circuit’s reasoning had broader implications in that it could “be applied to almost all public school artistic performances,” and that some school administrators “may choose to avoid ‘controversy’ by banishing all musical pieces with ‘religious connotations.’”⁴²⁵ Justice Alito concluded:

A reasonable reading of the Ninth Circuit's decision is that it authorizes school administrators to ban any controversial student expression at any school event attended by parents and others who feel obligated to be present because of the importance of the event for the participating students. A decision with such potentially broad and troubling implications merits our review.⁴²⁶

iii. Comments on the Opinions of Judge Smith and Justice Alito

The concurrence of Judge Smith and the dissent of Justice Alito are trenchant criticisms of the lower court opinions, especially in regard to their concern that a broad reading of *Nurre* could lead to the prohibition of religiously inspired works at all school functions. Much of what Brandsma and Whitehead said in their invocation of *Weisman* about school control of graduation ceremonies might also be said of any school event.⁴²⁷ Although the audience of a graduation is “captive” in the sense that the graduates and their families and friends would not want to miss the event, or have it ruined by proselytizing religious expression that they have no use for or even find offensive, the same may be said for a concert, or a play, or any other school event that may be of great importance to a particular student who wishes to perform or participate in the event. The Supreme Court’s transference of the rationale for banning government organized prayer from the graduation ceremony in

421. See *id.*

422. *Id.* at 1028–29 (citing Bd. of Educ., *Island Trees Union Free School Dist.*, No. 26 v. *Pico*, 457 U.S. 853, 871–72 (1982); and *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508–09 (1969)).

423. *Id.* at 1029 (quoting *Nurre*, 508 F.3d at 1095) (“The tension between this reasoning and the fundamental free speech principles noted above is unmistakable.”).

424. *Nurre*, 559 U.S. at 1030.

425. *Id.* (citing *Nurre*, 508 at 1095, 1091).

426. *Id.*

427. See *supra* notes 62–63, 67 and accompanying text.

Weisman to the high school football game of *Santa Fe* is evidence of the permeable line between graduation and other school events.⁴²⁸ If the title of an instrumental musical work such as "Ave Maria" may be objectionably controversial at graduation, it could be controversial and therefore deemed unacceptable at any event a school sponsors.⁴²⁹ But the final irony is that, contrary to Whitehead and Brandsma, *Weisman* itself did not perceive graduations to be so special as to require the complete exclusion of any religious trappings: "[A]t graduation time . . . there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students."⁴³⁰

In her book, *Lessons in Censorship*, Ross traces the evolution of the Supreme Court's treatment of student speech rights.⁴³¹ After *West Virginia State Board of Education v. Barnette*,⁴³² and *Tinker*, the Court proceeded to cut back on student rights in several cases, of which *Hazelwood* is the most significant.⁴³³ In holding that schools may censor student speech in sponsored school activities where members of the audience may attribute the speech to the school, *Hazelwood*, as noted above, provided the district court with the starting point in its argument that Jackson High School could legally censor Nurre's musical performance.⁴³⁴ But many courts forget *Hazelwood*'s second requirement for a school's censorship of student speech, as did the courts in *Nurre*. School officials may restrict student speech as long as the speech occurs in the context of a school-sponsored activity, and "so long as [the school officials'] actions are reasonably related to legitimate pedagogical concerns."⁴³⁵ If the prohibition in *Nurre* was as unreasonable and overblown as Smith and Alito suggest, potentially leading to the prohibition of any music that has any relation to religion in any school-sponsored event, the action of the school officials was far more deleterious than beneficial to "legitimate pedagogical concerns."

The persuasive legal arguments Smith and Alito advance notwithstanding, their opinions are even more provocative in regard to the educational effects of the

428. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301–02 (2000) ("In *Lee v. Weisman* . . . we held that a prayer delivered by a rabbi at a middle school graduation ceremony violated that Clause. Although this case involves student prayer at a different type of school function, our analysis is properly guided by the principles that we endorsed in *Lee*." (citations omitted)).

429. See *Petition for Writ of Certiorari*, *supra* note 45, at *19, (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975) (citations omitted) ("The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, 'we are inescapably captive audiences for many purposes.' . . . Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.")).

430. *Lee v. Weisman*, 505 U.S. 577, 598–99 (1992).

431. Ross, *supra* note 25, at 13–62.

432. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). In *Barnette*, the Supreme Court held that school officials violated the free speech rights of students who were Jehovah's Witnesses by punishing them for refusing to salute the flag, an act contrary to their religious beliefs. *Id.* at 642. The opinion includes the robust language, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." *Id.*

433. Ross, *supra* note 25, at 44–54.

434. See *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

435. *Id.* at 273.

Ninth Circuit opinion, for both jurists argue that the unconstitutional narrowing of students' free speech could lead to a stifling constriction in all areas of knowledge and creativity that public schools should, on the contrary, zealously foster and nourish.

IV. THE ORAL ARGUMENT⁴³⁶

The significance of statements made in oral argument should be considered with caution since such statements are likely expressed with less deliberation and forethought than arguments made in briefs and court opinions. However, because they arise spontaneously and instinctively, these statements might provide genuine insight into the real motives underlying the positions taken by the litigants, litigators, and judges, motives that are not expressed officially in court documents because they won't quite withstand legal scrutiny and, in short, don't look so good.

Aside from the Ninth Circuit panel's occasional indulgence in witticisms about the phrase "Ave Maria" as a football term (the "Hail Mary Pass"), particularly at Notre Dame,⁴³⁷ the oral arguments, as one might expect, proceeded to address important issues in the litigation. One issue was whether to apply *Pearson*, which would allow the court to forego addressing the constitutional issues altogether.⁴³⁸ Another was whether the audience would have recognized the religious significance of "Ave Maria,"⁴³⁹ and whether school officials may decide what is and is not religious expression.⁴⁴⁰ However, the oral arguments also revealed something about the motives of the school administrators in pursuing such an intolerant policy towards religious expression at graduation. In response to Judge Smith's question of whether the school district may have been too careful in prohibiting the performance of a piece of music merely because of its title, the attorney for the school district, Mr. Patterson, made the following point:

But I can tell you this, judge, is that I cannot tell my client to be not careful enough in this situation. We have already got budget constraints and every time I stand up here, we get one more teacher out of that classroom and I got to tell my client you've got to be careful, you can't bring on a lawsuit because they're expensive.⁴⁴¹

Thus, fear of a costly lawsuit that might compromise the educational mandate of the school may overrule all other considerations, including reasonableness. Ironically, the school district provoked a lawsuit by being as careful as it was to avoid an Establishment Clause violation. Later, Judge Tallman asked Patterson about whether he would advise his client to prohibit the instrumental performance of a

436. Oral Argument, *Nurre v. Whitehead*, 580 F.3d 1087 (2009) (No. 07-35867), <https://www.c-span.org/video/?283553-1/nurre-v-whitehead-oral-argument>.

437. *Id.* at 8:45.

438. *Id.* at 4:04 (regarding the *Pearson* issue, which the Supreme Court had issued one day before the *Nurre* oral arguments). See *supra* notes 103–105 and accompanying text.

439. *Id.* at 9:58.

440. *Id.* at 23:17.

441. *Id.* at 21:02.

work such as the "Ode to Joy" from Beethoven's Ninth Symphony because of a potential lawsuit regarding the religious expression of some of its lyrics.⁴⁴² Here is the full exchange on the subject:

Judge Tallman

[T]he problem that, that I have in trying to figure out where we draw the line is what would you do for example if Ms. Nurre had come back and said I would like to play from . . . Beethoven's Ninth Symphony, "Ode to Joy." . . . There's nothing in the title that suggests that it might be religious. You would actually have to know something about the history and the lyrics but this is going to be played as an instrumental piece. What would your advice be to Superintendent Whitehead if Ms. Nurre had proposed "Ode to Joy"?

Mr. Patterson

If, in fact, I thought that there was a likelihood that there would be an article in the newspapers and that . . . indeed somebody might bring a claim, I would advise her that you better take the safe side and you better do exactly what . . . Deputy Superintendent [Karst Brandsma] did and said, I'm requesting that music selections of graduation be entirely secular or you increase your graduation program and allow both secular and non-secular music to occur⁴⁴³

442. Oral Argument, *supra* note 436, at 26:20. Though generally considered secular in nature, the "Ode to Joy" does have some rather religious lyrics. For example:

Brothers, above the starry canopy
There must dwell a loving father.
Do you fall in worship, you millions?
World, do you know your creator?
Seek Him in the heavens;
Above the stars must he dwell.

Aaron Green, *Beethoven's "Ode to Joy": Lyrics, Translation, and History*, THOUGHTCO. (Aug. 26, 2017), <https://www.thoughtco.com/beethovens-ode-to-joy-lyrics-history-724410>. The German title is "An die Freude," and these lines read as follows in German:

Brüder, über'm Sternenzelt
Muß ein lieber Vater wohnen.
Ihr stürzt nieder, Millionen?
Ahnest du den Schöpfer, Welt?
Such' ihn über'm Sternenzelt!
Über Sternen muß er wohnen.

Id.

443. Oral Argument, *supra* note 436 at 26:20; *cf. supra* notes 81–85 and 376 and accompanying text, indicating that, aside from "Ave Maria," there was a good amount of secular music played at the Jackson High School graduation of 2006. The courts paid no attention to this, which begs the issue, how much must the graduation program be expanded to include secular and non-secular music so that the school is still on "the safe side"?

Patterson's advice that the school "take the safe side" reveals the real standard school administrators may well be applying in deciding whether to ban student religious speech from a graduation ceremony.⁴⁴⁴ It is not any judicial test for an Establishment Clause violation. It is not the threat of a lawsuit. It is not even whether someone has complained about the proposed musical work. The actual test is based on whether the school's zealously cautious lawyer perceives any possibility that something critical might appear in the local newspaper. This test does not rely on any legal standard, but rather on the real or imagined fear of some unfavorable opinion some member of the public might have, regardless of how extreme, intolerant, or unreasonable that opinion may be. In this case, the decision to prohibit "Ave Maria" was not based on any constitutional standard, threat of a lawsuit, or complaint about "Ave Maria."⁴⁴⁵ It was based on a complaint that concerned a very different musical performance a year before.⁴⁴⁶ This is not consistent with *Weisman's* view of graduations: "We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation."⁴⁴⁷ With some justification, Nurre's attorney, Mr. Vander Wel, spoke of this as the "whiff test:"

Essentially, what the school district is asking for here is some kind of whiff test. If there's a whiff of religion whether it's in a newspaper article or whether it's in a lawsuit or whatever. If there's a whiff of religion then we need to prohibit it. That's the conservative approach that Mr. Patterson is advocating. And that does not comport with the establishment clause of the U.S. Constitution.⁴⁴⁸

School administrators might not themselves harbor any hostility toward religion, but if the "whiff test" is indeed the standard, this test is the quintessence of hostility toward religion, because it accommodates the most hostile *possible* view of religion that may be *imagined* regardless of how unreasonable or even absurd the view may be.⁴⁴⁹ This is what "zero tolerance" is all about.

Certainly, school administrators fear lawsuits because of how costly they are to the school's budget. As Patterson suggested, every dollar spent on a lawsuit is

444. *Id.*

445. *Nurre v. Whitehead*, 580 F.3d 1087, 1095 (9th Cir. 2009).

446. *Id.* at 1091.

447. *Lee v. Weisman*, 505 U.S. 577, 597 (1992).

448. Oral Argument, *supra* note 436, at 32:26.

449. Brief of Appellant, *supra* note 38, at 34 ("The actual purpose of [Whitehead's] order was to kowtow to the vocal minority who believe that all traces of religion should be removed from public life, regardless of whether the purposes and policies served by the Establishment Clause are implicated."); see also *Petition for Writ of Certiorari*, *supra* note 45, at *25–26 ("In applying the endorsement test, the [Sixth Circuit] warned against the danger that religious expression will be suppressed in response to those who look upon religion with a 'jaundiced eye.' . . . [The Sixth Circuit wrote]: . . . 'We believe that the plaintiffs' argument presents a new threat to religious speech in the concept of the "Ignoramus's Veto." The Ignoramus's Veto lies in the hands of those determined to see an endorsement of religion, even though a reasonable person, and any minimally informed person, knows that no endorsement is intended, or conveyed.'" (quoting *Americans for Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1992))).

a dollar taken away from the essential mission of the public school, the education of children.⁴⁵⁰ It appears that in recent years, the intrusion of the courts, statutory mandates, and the involvement of parents have all led to a greater litigiousness in schools and greater pressure on school administrators to avoid lawsuits.⁴⁵¹ In any event, the lack of evidence of any real controversy and the potent concern about litigation costs articulated in the oral arguments suggest that the rationale of "controversy" was a bit disingenuous on the part of the Ninth Circuit. The school administrators and their legal counsel were primarily concerned with the specter of a costly lawsuit which the lone complaint in the *Herald* might have imparted to them. Better to "play the safe side" than take a risk.

Consider the situation of Principal Cheshire when he rejected Moffat's offer to list "Ave Maria" as "A Selection by Franz Biebl." He said, "[I]t would be unethical to inaccurately or untruthfully list the titles to pieces."⁴⁵² Cheshire didn't explain his rationale for why such a listing would be unethical or untruthful.⁴⁵³ There would have been nothing untruthful or deceptive about listing "Ave Maria" as "A Selection by Franz Biebl." It was indeed a selection by Franz Biebl.⁴⁵⁴ If the school had thus listed the music in the graduation program, the most reasonable interpretation for the omission of the religious title would have been that the school was attempting to avoid the appearance of an implied endorsement of religion. But under Cheshire's rationale, it would have been preferable to actually advertise the religious background of "Ave Maria," making a government endorsement of religion more plausible. On the other hand, hiding this background was unacceptable to Cheshire's way of thinking because that would be untruthful and unethical. Either way, the students would not be able to perform their choice of music, another double-bind.

450. See *supra* note 441 and accompanying text.

451. See generally, James Wasser, *I'm Calling My Lawyer*, AASA: The School Superintendents Association, <http://aasa.org/SchoolAdministratorArticle.aspx?id=6506> (providing advice in addressing lawsuits against schools and stating in regard to a particular school district where legal expenses exceeded \$500,000 for 2003-04, "The number of lawsuits, the amount of administrative/staff time preparing for and appearing in the courtroom and subsequent expenses were unacceptable. These lawsuits were taking public money and valuable time away from our students."); Ron Schachter, "See You in Court," District Administration (Apr. 2007), <https://www.districtadministration.com/article/see-you-court> (stating, "In Florida, we've spent millions and millions of dollars defending against lawsuits" and "82 percent of teachers and 77 percent of principals say they have made decisions driven by a fear of legal challenges."); Gary Hopkins, *Has the Threat of Lawsuits Changed Our Schools?*, Education World, The Principal Files, http://www.education-world.com/a_admin/admin/admin371.shtml (quoting a middle school principal as stating, "The current legal atmosphere creates a more cautious approach for me and my district. . . . We are always considering the legal ramifications of issues with students and staff. The threat of a lawsuit, no matter how frivolous, is something that colors many decisions we make.").

452. See *supra* notes 70–71 and accompanying text.

453. Patterson commented at oral argument, "But the point was that the principal [sic] here in, indicating that Ave Maria despite the fact that it was going to be an instrumental was going to be listed on the program. And the suggestion was made, well, why don't we just take that off? And the point was is we're not going to take that off because that wouldn't be truthful, that would be deceptive and we're not going to allow that because we want to be transparent." Oral Argument, *supra* note 436, at 25:37.

454. Matthew Oltman, *The Iconic One Hit Wonder: The History and Reception of Franz Biebl's Ave Maria 1-2* (July 2017) (unpublished DMA dissertation, University of Nebraska-Lincoln) (on file with Student Research, Creative Activity, and Performance – School of Music, University of Nebraska-Lincoln).

Why unethical? Could it be that if the school were to allow the performance of “Ave Maria” without identifying its proper religious name, perhaps the school could then be accused of surreptitiously subjecting dissenters to religious music without their knowing it? Perhaps this might be an even worse violation of the Establishment Clause than forcing a captive audience to listen to religious music identified as such, because in that case at least the audience would know of the imposture. What if such dissenters discover they like the music which they otherwise would despise had they known of its religious association? If this is indeed a harm, the only solution is banning the music with its religious title. But if that is necessary, would it not be necessary to ban any other expression of art, history, or knowledge with a religious connection? Must public school authorities enforce a blanket ban on a student speaker’s mention of the opposition to slavery on the basis of religion by Christians such as William Wilberforce,⁴⁵⁵ or the big bang theory of the Catholic priest, Georges Lemaître?⁴⁵⁶ The vast constriction of knowledge is patent. As Justice Alito put it, “Why . . . should the Ninth Circuit’s reasoning apply only to musical performances and not to other forms of student expression, including student speeches at graduation ceremonies and other comparable school events?”⁴⁵⁷

Cheshire could have relayed Moffat’s offer to his superiors such as Brandsma and Whitehead, to see if it could be acceptable as a compromise. After all, even in the *Lassonde* case, the principal did not outright forbid any proselytizing speech, but negotiated a resolution of the issue.⁴⁵⁸ However, the reader may recall Whitehead’s testimony that the previous year was Cheshire’s first as principal of Jackson High School.⁴⁵⁹ Not knowing that he was supposed to examine the lyrical contents of any musical performance as well as the title, Cheshire approved the choral performance of “Up Above My Head” without knowing its lyrics, which were the source of the controversy that concerned Whitehead.⁴⁶⁰ The testimony implies some blame may have been placed on the principal for the complaints. Cheshire may have been right to conclude that the School District Administration had made a final decision and the best thing for the students would be to move on so they could

455. See generally BERTRAM WYATT-BROWN, *LEWIS TAPPAN AND THE EVANGELICAL WAR AGAINST SLAVERY* 6 (1997) (discussing William Wilberforce’s opposition to slavery on the basis of his Christian faith); ERIC METAXIS, *AMAZING GRACE: WILLIAM WILBERFORCE AND THE HEROIC CAMPAIGN TO END SLAVERY* (2007) (discussing William Wilberforce’s opposition to slavery on the basis of his Christian faith).

456. See generally THE BIG BANG AND GEORGES LEMAÎTRE: PROCEEDINGS OF A SYMPOSIUM IN HONOUR OF G. LEMAÎTRE FIFTY YEARS AFTER HIS INITIATION OF BIG-BANG COSMOLOGY, LOUVAIN-LA-NEUVE, BELGIUM, 10–13 OCTOBER 1983 (André Berger ed. 1984) (discussing Georges Lemaître’s development of the big bang theory); JOHN FARRELL, *THE DAY WITHOUT YESTERDAY: LEMAÎTRE, EINSTEIN AND THE BIRTH OF MODERN COSMOLOGY* (2005) (discussing Georges Lemaître’s development of the big bang theory).

457. *Nurre v. Whitehead*, 559 U.S. 1025, 1030 (2010); cf. Jonassen, *supra* note 25, at 761–62.

458. *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 981 (9th Cir. 2003) (“Before Plaintiff agreed to excise the proselytizing portions of the graduation speech, the parties engaged in discussions to determine what Plaintiff would and would not be allowed to say. . . . The parties eventually reached a compromise.”).

459. See *supra* notes 40–41 and accompanying text.

460. See *supra* notes 42–43 and accompanying text.

prepare to perform another musical work.⁴⁶¹ It may have been pointless and impolitic to attempt to save the performance of “Ave Maria” which the higher school official had definitely decided to reject.

One more incident from the oral argument is worthy of note. Near the end of the session, Vander Wel declared that Nurre “had a right to choose the song and the question is why was that right deprived from her?”⁴⁶² Judge Beezer then asked, “Wait a minute, is that a, is that a right or is that just part of the educational process?”⁴⁶³ And then there is a pause in which Judge Beezer added under his breath in an impatient if not exasperated tone, “Come on . . .”⁴⁶⁴ “Come on” is an informal phrase whose meaning depends a lot on the context and manner with which it is expressed.⁴⁶⁵ With the right intonation, the phrase is used to express disagreement, or disbelief, or annoyance: *Oh come on, Kyle, you made the same excuse last week!*⁴⁶⁶ Did the phrase betray an elemental skepticism on the part of Judge Beezer that Nurre’s case implicated any free speech rights at all?

V. THE AMICI CURIAE BRIEFS

A. The National School Boards Association

There were two Amici Curiae briefs submitted to the Ninth Circuit in the *Nurre* case that favored the school district and warrant discussion.⁴⁶⁷ One was submitted by the National School Boards Association (NSBA) and several other organizations representing school boards and school administrators who supported the Everett School District.⁴⁶⁸ This brief pointed out the legal confusion surrounding Free Speech and Establishment Clause issues in public schools and questioned whether instrumental music subject to the approval of school administrators should enjoy free speech protection at all.⁴⁶⁹ The brief also reviewed the ill effects of litigation expenses on education and educators, arguing for a “play in the joints” rule by

461. Deposition upon Oral Examination of Lesley Moffat, *supra* note 37, at 41 (quoting Cheshire as stating, “Graduation’s coming up. We need to move forward with this,” and continuing “And so it was agreed that it would not make sense to try to hold out and do this so that these kids then at the last minute might not be able to.”).

462. Oral Argument, *supra* note 436, at 31:37.

463. *Id.* at 31:41.

464. *Id.* at 31:47. The Transcript from Westlaw, *supra* note 100, at *11, has “go on” rather than “come on.” The reader, however, may listen to the video recording, *supra* note 436, to decide what the judge actually said. In the author’s opinion, it was, “come on,” with the intonation described above.

465. See Cambridge Dictionary, *Meaning of “come on” in the English Dictionary*, CAMBRIDGE DICTIONARY, <http://dictionary.cambridge.org/dictionary/english/come-on> (last visited Mar. 30, 2018).

466. *Id.*

467. See Brief of Amici Curiae National School Boards Association, et. al., in Support of Defendant-Appellee, *Nurre v. Whitehead*, 580 F.3d 1087 (9th Cir. 2009) (No. 07-35867), 2008 WL 1723135 [hereinafter *NSBA Brief*]; Brief of Americans United for Separation of Church and State as Amicus Curiae in Support of Defendant-Appellee’s Request for Affirmance, *Nurre v. Whitehead*, 580 F.3d 1087 (9th Cir. 2009) (No. 07-35687), 2008 WL 1723136 [hereinafter *Americans United Brief*].

468. *NSBA Brief*, *supra* note 467.

469. *Id.* at 9 (“Also at least debatable is whether the selection of a musical composition for final approval by school authorities constitutes protected speech at all — i.e., whether it represents a constitutionally protected viewpoint against which school officials *could* have discriminated.”).

which school officials may be afforded qualified immunity or some discretion in allowing or disallowing the performance of a work like “Ave Maria.”⁴⁷⁰

In effect, the brief was against the recognition of student rights, and the NSBA got what it wanted. Except for Justice Alito, all the judges who reviewed this case openly sympathized with the educators for the confusion in this area of law which the courts themselves have caused.⁴⁷¹ Not only did Judge Lasnik speak of school administrators “being whipsawed” by the contending demands of Free Speech and the Establishment Clause,⁴⁷² but Judge Smith observed that school officials “often find themselves in a Catch-22.”⁴⁷³ In recognition of the unsettled questions of law involved in this case, the district court gave Whitehead qualified immunity on all counts,⁴⁷⁴ and also ruled that the municipality had no liability because of the judge’s findings of no constitutional violations.⁴⁷⁵ Because the appellate court found that there was no violation of Nurre’s constitutional rights, it did not reach the qualified immunity issue.⁴⁷⁶ Finally, the Supreme Court denied certiorari, guaranteeing that this area of law would continue to be unsettled and confused, thereby providing school administrators with a good argument for qualified immunity and for taking “the safe side” in the future by banning any suggestion of a religious reference at graduation.⁴⁷⁷ The Supreme Court’s ruling in *Pearson* provided even more cover for school administrators, because under that ruling, a court may dismiss an alleged constitutional violation by examining the issue of qualified immunity before or even without addressing the constitutional issue.⁴⁷⁸ Except for cases of plain incompetence and knowing violation of the law, *Pearson* guarantees that a case like *Nurre* will almost always be dismissed, without any assessment of the violation of free speech. Matthew J. Shechtman has illustrated this problem well in his article, *Piercing Pearson: Is Qualified Immunity Curbing Students’ Religious Speech Rights?*⁴⁷⁹ Confronted with the difficult question of whether a school has violated a student’s right to free speech because of religious expression, an issue “scarcely clarified by Supreme Court jurisprudence,” courts have

[A]n easy out in the form of qualified immunity dismissal. Without ever addressing whether the student’s rights exist under the First Amendment, the school board and its policies can theoretically persist indefinitely under this legal regime . . . This potentially continuous immunity loop works to the detriment of students’ rights to free speech and religious exercise. It also allows for the entrenchment of poor school policy and the limitation of thought diversity at the most critical stages of child development.⁴⁸⁰

470. *Id.* at 18–19.

471. *See Nurre v. Whitehead*, 559 U.S. 1025 (2010).

472. *Nurre v. Whitehead*, 520 F. Supp. 2d 1222, 1239 (W.D. Wash. 2007).

473. *Nurre*, 580 F.3d at 1102.

474. *Nurre*, 520 F. Supp. 2d 1087, 1239–40 (9th Cir. 2009).

475. *Id.* at 1240–41.

476. *Nurre*, 580 F.3d at 1099 (“While Nurre could maintain a post-graduation claim for monetary damages, we hold that the district court properly granted summary judgment to the defendants—Whitehead and the District—because Nurre failed to show any constitutional violation.”).

477. *See supra* note 443 and accompanying text.

478. *See supra* notes 98–100 and accompanying text.

479. Shechtman, *supra* note 25.

480. *Id.* at 19–20 (footnotes omitted).

This is the “Ave Maria” effect which *Nurre* illustrates. The state of the law provides school administrators with the incentive to exclude all religious expression from high school graduations, whether violative of the Constitution or not, to eliminate any possibility of complaints or lawsuits, and even if this leads to “zero tolerance” for any expression that might be construed as religious, the uncertain state of the law provides these officials with qualified immunity under which such a blanket exclusion to avoid a lawsuit is acceptable under the Establishment Clause defense as long as it was not implemented by incompetence or in knowing violation of the law. How could any school administrator who bans religious expression be found incompetent or in knowing violation of the law if the law is not clarified?

Such a zero-tolerance policy, however, is not reasonable under the standards of the limited public forum under which it should be tested. Amidst the sympathetic shelter they granted to school administrators, most of the judges in *Nurre* demonstrated little concern for the rights and interests of students, who, after all, were the alleged victims of constitutional violations and the supposed beneficiaries of public school education, but who have no remedy even if their rights were violated.

B. Americans United for Separation of Church and State

Another Amicus Curiae Brief came from Americans United for Separation of Church and State.⁴⁸¹ Unlike the opinions of the district and appellate courts, this brief rejected forum analysis altogether by identifying all speech at a public school graduation as the school’s own speech, or government speech, so that students had no free speech rights at all:

Jackson High School did not create a forum for private expression by having its Wind Ensemble perform a song at its graduation ceremony . . . The School . . . exercised complete editorial control over its carefully planned and scripted graduation ceremony, retaining the authority to review and approve the song that its Wind Ensemble played. The Wind Ensemble performed only at the School’s invitation and direction . . . The Wind Ensemble performance constituted quintessential government speech. As such, the School – not any individual student – retained the authority and discretion to select the piece to be performed.⁴⁸²

According to this brief, the graduation ceremony was “no forum at all . . . one in which the government is the speaker and a right of private access does not exist.”⁴⁸³ Americans United, therefore, agreed that the Ninth Circuit reached the correct result, but argued that it was an error to assume there was any limited public forum.⁴⁸⁴ “[T]he analytical framework of the government-speech doctrine provides a more apt characterization of the speech at issue here because . . . the performance was presented by a Jackson High School class, at the government’s invitation, with the government’s approval and involvement, and subject at all times to the government’s control.”⁴⁸⁵

481. *Americans United Brief*, supra note 467.

482. *Id.* at 2–3.

483. *Id.* at 5.

484. *Id.* at 8–9.

485. *Id.*

In contrast to the opinions of the *Nurre* district and appellate courts, the Americans United brief's reasoning is at least coherent. By arguing that a graduation ceremony is no forum at all, Americans United avoids all the factual and logical inconsistencies and arbitrary citations to authorities evident in the *Nurre* opinions that result from assuming that a limited public forum existed at the Jackson High School graduation, and then ignoring that assumption. But there are at least two major problems with the Americans United brief. The first is that it overlooks the district court's finding that there was a genuine question of material fact as to whether the school exercised sufficient control and censorship over what the Wind Ensemble played at graduation—that is, there was sufficient dispute to preclude summary judgment based on the absence of a limited public forum. That finding made it a matter of Civil Procedure 101 for the court to have the jury decide the factual issues that would determine the type of forum the court was addressing.⁴⁸⁶

The second problem concerns Americans United's argument for the absolute exclusion of free speech at a public school graduation and its embrace of the notion that all speech at such events is government speech.⁴⁸⁷ This position rests on a set of citations to opinions which purportedly identified the purpose of graduation ceremonies. The brief quotes the following statement from *ACLU v. Black Horse Pike Regional Board of Education*: “[h]igh school graduation ceremonies have not been regarded, either by law or tradition, as public fora where a multiplicity of views on any given topic, secular or religious, can be expressed and exchanged.”⁴⁸⁸ This statement originated from a district court opinion in *Lundberg v. West Monona County School District*, which stated without any legal citation or historical authority,

486. See *supra* note 174 and accompanying text.

487. Americans United admitted of only one case as an instance in which the “government ha[s] completely ceded authority over the selection and presentation of graduation-ceremony content” so that the resulting expression would “qualify as free speech.” *Americans United Brief*, *supra* note 466, at 23. *Adler v. Duval County School Board* addressed the issue of “whether the Duval County school system’s policy of permitting a graduating student, elected by her class, to deliver an unrestricted message of her choice at the beginning and/or closing of graduation ceremonies is facially violative of the Establishment Clause.” 206 F.3d 1070 (11th Cir. 2001) (en banc), *aff’d en banc*, 250 F.3d 1330, 1332 (11th Cir. 2001). The Eleventh Circuit ruled that such a policy does not violate the Establishment Clause even if it were to result in a graduation prayer or, presumably, a proselytizing message, as long as the school did not review the chosen speech. 250 F.3d at 1342.

[T]he total absence of state involvement in deciding whether there will be a graduation message, who will speak, or what the speaker may say combined with the student speaker’s complete autonomy over the content of the message [means] that the message delivered, be it secular or sectarian or both, is not state-sponsored.

Id. at 1342 (quoting *Adler*, 206 F.3d at 1071). *Adler* is different from *Nurre* to the extent that the policy in *Adler* would permit a religious message at graduation, so that *Adler* is a true Establishment Clause case. *Nurre* does not involve a religious message, so that it is not really an Establishment Clause case, but rather a case in which Establishment Clause concerns lead to censorship of much more than religious expression, violating the right of Free Speech. Thus, Americans United for Separation of Church and State advanced an analysis that accepts *Adler*, which would allow religious messages at a graduation, or messages that could presumably be racist, sexist, or homophobic, as long as school authorities had nothing to do with the message, but disapproves *Nurre*’s case, where the performance of a musical work at graduation would have had little or nothing to do with religion at all.

488. 84 F.3d 1471, 1478 (3d Cir. 1996).

“[g]raduation ceremonies have never served as forums for public debate or discussions, or as a forum through which to allow varying groups to voice their views. Schools hold graduation ceremonies for very limited secular purposes—to congratulate graduates of the high school.”⁴⁸⁹ The statement then appeared in the Third Circuit opinions of *Brody v. Spang*,⁴⁹⁰ *Black Horse*, and finally in the Fifth Circuit’s opinion for *Doe v. Santa Fe Independent School District*,⁴⁹¹ which cited *Brody* rather than *Lundberg* for the proposition, prompting one of the dissenting judges to aptly observe, “[T]he majority panhandles a remote district court’s musings as Third Circuit law without proper attribution.”⁴⁹² In fact, the statement is untrue.

In 1940, the University of Pennsylvania accepted a Ph.D. dissertation submitted by William L. Fink, the vice-principal of Reading High School in Reading, Pennsylvania.⁴⁹³ It was entitled, “Evaluation of Commencement Practices in American Public Secondary Schools.”⁴⁹⁴ For his dissertation, Fink surveyed and analyzed the graduation practices of three hundred and thirty-two public high schools from all over the United States.⁴⁹⁵ The study consists mostly of the answers that cooperating school officials provided in response to Fink’s questionnaire about the practices of their high school commencement exercises.⁴⁹⁶ A particular area of interest was the extent of student participation in planning and organizing the graduation exercises.⁴⁹⁷ Fink presented a table categorizing the varying degrees of student participation permitted by the schools in planning the ceremonies.⁴⁹⁸ The table also indicated the number of schools which placed themselves in each of these categories.⁴⁹⁹

| Pupil Participation in Planning Program | Number of Schools |
|---|--------------------|
| I. Class has no voice in planning the program | 93 |
| II. Class had some voice in planning the program | 128 |
| III. Class had considerable voice in planning the program | 80 |
| IV. Program was entirely class planned | 20 |
| V. Any other method | 5 |
| VI. No information | 6 |
| TOTAL | 332 ⁵⁰⁰ |

489. 731 F. Supp. 331, 339 (N.D. Iowa 1989).

490. 957 F.2d 1108, 1119–20 (3d Cir. 1992) (quoting *Lundberg*, 731 F. Supp. at 339).

491. 168 F.3d 806, 820 (5th Cir. 2000) (citing *Brody*, 957 F.2d at 1117) (“Neither its character nor its history makes the subject graduation ceremony in general or the invocation and benediction portions in particular appropriate fora for such public discourse.”).

492. *Id.* at 832 n.12 (Jolly, J., dissenting).

493. William Leroy Fink, *Evaluation of Commencement Practices in American Public Secondary Schools* (1940) (unpublished Ph.D. dissertation, University of Pennsylvania). Mr. Fink is identified as the vice-principal of Reading High School in several articles from a local newspaper, for example, *Students in Service*, *READING EAGLE*, Nov. 10, 1943, at 16, <https://news.google.com/newspapers?nid=1955&dat=19431110&id=N6khAAAAIBAJ&sjid=fJoFAAAAIBAJ&pg=3750,135668&hl=en>.

494. Fink, *supra* note 492, at 30.

495. *Id.* at 30.

496. *See generally id.*

497. *See generally id.*

498. *Id.* at 89.

499. *Id.*

500. Fink, *supra* note 493, at 89.

As the author observed, "[S]chools in which pupils have at least some voice in planning the commencement program outnumber more than two to one schools in which the pupils have no such privilege."⁵⁰¹ The table also reveals that schools in which students either had a considerable voice in planning or planned the entire graduation program themselves made up just over thirty percent of all the schools that responded.⁵⁰²

From the high schools that responded, Fink distilled a set of seventeen master objectives, under which he listed general commencement practices that he believed contributed to the achievement of these master objectives; then, under the general practices, Fink listed specific examples of what the students actually were allowed to do at their graduation exercises.⁵⁰³ Among the master objectives and their supporting general practices and specific examples are the following:

Master Objective VI: To offer an opportunity for active student participation.⁵⁰⁴

General Practice

1. Members of the class have a voice in choosing the commencement theme.⁵⁰⁵

Specific Example

In Manhasset, Long Island, "[a] panel discussion prepared for assembly became the basis of a commencement program . . ."⁵⁰⁶

General Practices

2. [Students] participate actively in planning the program.⁵⁰⁷
3. The program is presented wholly by the class, except for the presentation of diplomas and awards.⁵⁰⁸

501. *Id.*

502. *Id.* at 89.

503. *Id.* at 72–113. From the schools that had responded, Fink selected one at random from each of the then forty-eight states and asked the principals of these schools to list their objectives in planning their graduation exercises. *Id.* at 41. Through a process Fink called "telescoping," he assembled one hundred and fifty-five objectives which he distilled from the following sources: a jury of education professionals, the literature on commencement, responses of forty-eight principals of responding schools selected at random one from each state, and a group of college professors. Fink reduced these objectives into seventeen categories which he called "master objectives." *Id.* at 47–69. He then added the general practices and specific examples which supported the master objectives. *Id.* Fink collected these examples from commencement programs and announcements, from responses he got to his questionnaire, and from the Pennsylvania high school commencements he personally attended in 1938 and 1939. Fink, *supra* note 492, at 71.

504. *Id.* at 88.

505. *Id.*

506. *Id.* at 88–89.

507. *Id.* at 89.

508. *Id.*

6. The script is pupil written; it is not edited by adults to the point where it ceases to be the work of the pupil.⁵⁰⁹

Master Objective VII: To encourage creative effort in a large range of activities.⁵¹⁰

General Practice

1. Under proper guidance, the class is permitted to plan a program which is truly representative of the philosophy of the class.⁵¹¹

Specific Example

In Plymouth, Massachusetts, a senior class planned "an interesting commencement program featuring a New England town meeting."⁵¹²

General Practice

2. The program reflects the degree of originality which the class possesses.⁵¹³

Specific Example

In Chambersburg, Pennsylvania, students presented a program with a dramatic production. One of its episodes was a discussion of "the problems of American youth."⁵¹⁴

General Practice

3. The script of the program represents a creative work in English composition.⁵¹⁵

Specific Example

In Lincoln, Nebraska, the teachers committee selected two compositions for oral presentation at commencement.⁵¹⁶

509. Fink, *supra* note 493, at 89.

510. *Id.* at 90.

511. *Id.*

512. *Id.* at 91.

513. *Id.*

514. *Id.*

515. Fink, *supra* note 493, at 91.

516. *Id.*

General Practice

4. Composing, harmonizing, or rendering musical compositions challenges creative effort.⁵¹⁷

Specific Example

Among several examples of musical presentations, the students in Muhlenberg Township, Pennsylvania presented a program entitled "America's Musical Heritage" featuring "Indian, Pilgrim, and Negro music."⁵¹⁸

According to Fink's study, during the nineteen thirties, graduating seniors at American public high schools commonly presented panel discussions, town hall meetings, dramatic and musical performances, and readings of student works at their graduation ceremonies as exhibits of their educational achievements. Almost a third of all high schools permitted students to plan a considerable portion of their graduation ceremonies themselves.⁵¹⁹ This taxonomy of pre-World War II commencement practices in American public high schools is good evidence of the freedom and variety of creative expression, including political expression, that many secondary schools of the time afforded their students at commencement. Further historical research reveals that the student speeches traditionally delivered by valedictorians and salutatorians at American public high school commencements find their origin in student speeches delivered by each one of the graduates at commencement as a demonstration of what every graduating student had learned.⁵²⁰

The argument of Americans United is thus based on a false premise. Contrary to Americans United,⁵²¹ graduation ceremonies by both tradition and government delegation celebrated the achievements of the graduates, not simply by handing out diplomas, but through exhibitions of what the students had learned and the talents they had developed through their own self-expression, even permitting spontaneous debate in what today would probably be termed limited public forums.⁵²² The argument of Americans United, stripped of its historical and judicial underpinning, is revealed to be the same tautology discussed earlier: that student

517. *Id.*

518. *Id.* at 91–92.

519. *See supra* note 500–501 and accompanying text.

520. Jonassen, *supra* note 25, at 766–75.

521. *Americans United Brief*, *supra* note 466.

522. Of course, one must not naively idealize the era. School officials probably retained ultimate authority to allow or forbid student expression at graduation. This was also the time of segregated schools and the Jim Crow South, long before *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), put an end to the legality of segregating public schools by race, and long before the passage of the Civil Rights Act of 1964 outlawed discrimination based on race, color, religion, sex, or national origin in voter registration, schools, the workplace, and public accommodations. There was far less diversity of ethnicity and race in the schools. However, for evidence that even in a segregated school in Alabama during the 1920s, a student believed that the principal could not dictate to him what to say in his valedictorian speech, and was allowed to give his own speech, see RICHARD WRIGHT, *BLACK BOY: A RECORD OF CHILDHOOD AND YOUTH* 202–06 (World Publ'g Co. 1950) (1937).

speech at graduation is subject to censorship because it is being censored.⁵²³ The tautology effectively excludes the possibility that the students have any free speech rights predicated on the establishment of a limited public forum. But if free speech does not exist whenever the government decides to exercise censorship, the question arises: Is there any forum in which free speech rights are guaranteed?⁵²⁴ What is to prevent the state from simply censoring speech in any forum, including the traditional public forum, if the state's power to censor is all that is needed to justify censorship? Whether in a limited public forum or in a traditional public forum free speech exists, if it exists at all, only because of the guarantees found in the government's compact with the people, the Constitution, in which the government makes a covenant to restrain itself in limiting speech, regardless of the government's power to censor speech completely.

For all its consistency, the brief submitted by the Americans United for Separation of Church and State exhibits an intellectual tendency towards intolerance bordering on totalitarianism. It skirts the issue of whether any free speech rights exist based on the circumstances of the case and lends facile support to government control for any speech the government objects to no matter how unreasonable. As this Article has argued several times, this case was not about freedom of religious expression. It was really about freedom of artistic expression. The fact that Americans United got behind this suppression of artistic expression merely because of the name of the prohibited musical work indicates how the unreasonable imposition of Establishment Clause limitations can lead to zero-tolerance prohibition of expression far beyond genuine religious expression, even to cultural icons like the "Ode to Joy." It is also an indication of how hostility to religion can lead to the suppression of free speech rights having little to do with religion.

To see this, one need look no further than the survey of William L. Fink, who documented musical and dramatic performances, debates, and new England style town hall meetings at public high school graduations in the 1930s and '40s.⁵²⁵ This was a liberal tradition of a bygone era, which, to some extent, is also reflected in *Tinker* whose author, Justice Fortas, writing in 1969, was perhaps not so far removed from Fink's time period to have forgotten the importance of free expression in public school education:

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. . . . In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.⁵²⁶

523. See *supra* Section III(D)(ii)(b)(2).

524. See *supra* notes 154–158 and accompanying text on the varying tests the courts apply to government restrictions on speech depending on the type of forum involved.

525. See *supra* notes 493–518 and accompanying text.

526. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* 393 U.S. 503, 511 (1969).

Compare this to the contemporary assessment of a distinguished constitutional scholar: "Student speakers, such as valedictorians, are only permitted to deliver speeches that the school authorities accept as furthering the goals and objectives of the graduation ceremony."⁵²⁷ School authorities "can decide that the only students permitted to speak will recite the principal's favorite poem."⁵²⁸

VI. CONCLUSION

In its *Amicus Curiae* brief, the National School Boards Association made the following point:

[L]awsuits like this one frequently lead to ironic results. . . . [L]itigation ostensibly intended to defend freedom of expression in schools often has the opposite effect. . . . [I]f allowing students to make an initial selection of music is to be construed as opening a limited open forum and exposing school officials and the public fisc to greater potential liability . . . *Amici* fully expect that the prudent if regrettable response will be to avoid the question in the future by having school officials alone make every such selection.⁵²⁹

In this way, the National School Board Association elegantly told the judges that in the event Nurre should vindicate her free speech rights, the victory would only lead to greater repression of student speech. As it is, even though Nurre lost, one may rest assured that the school officials of the Everett School District and others will control student expression at graduation all the more tightly so that there would be no possibility that any court could conclude that the school had created a limited public forum. This is a classic no win situation. A "Catch 22" indeed.

When the Supreme Court in *Weisman* spoke of the "high degree of control" principals exercise over the program, speeches, timing, movements, dress, and decorum of the students at graduation,⁵³⁰ when the *Cole* opinion referred to the "plenary control" schools exercise especially over student speech at graduation,⁵³¹ when courts flatly state that graduation ceremonies have never been "regarded, either by law or tradition, as public fora where . . . views . . . can be expressed and exchanged,"⁵³² these courts were not reflecting the traditional nature of graduation practices which Fink recorded in the nineteen thirties and forties.⁵³³ But these assessments of graduation ceremonies might well reflect what has become standard operating procedure for high school graduations today, when school administrators and their lawyers defensively exercise control over student expression at gradua-

527. Alan E. Brownstein, *Prayer and Religious Expression at High School Graduations: Constitutional Etiquette in a Pluralistic Society*, 5 NEXUS 61, 61–62 (2000).

528. *Id.*

529. *NSBA Brief*, *supra* note 467, at 17–19.

530. *Lee v. Weisman*, 505 U.S. 577, 597 (1992).

531. *Cole v. Oroville Union High Sch.*, 228 F.3d 1092, 1103 (9th Cir. 2000).

532. *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1478 (3d Cir. 1996).

533. *See Fink*, *supra* note 493.

tion by scrupulously reviewing and scrubbing student speech clean of any expression that could conceivably lead to litigation.⁵³⁴ As *Nurre* demonstrates, school officials do this because the complicated and uncertain state of the law puts them in fear of lawsuits and controversy if they make a mistake in allowing students freedom of expression at graduation. Thus, schools implement a zero-tolerance policy which can cover much more than what can reasonably be considered religious expression. What is significant about the *Nurre* decision is that it marks the point in which the courts have tacitly given their blessing to all this with little recourse in sight.

Fink's survey was taken before the Supreme Court accorded students any rights of free speech in cases such as *Barnette* in 1943 (holding that the Free Speech Clause of the First Amendment protects students in public schools from being forced to salute the American flag or recite the Pledge of Allegiance)⁵³⁵ and *Tinker* in 1969 (holding that the free Speech Clause of the First Amendment protects the right of students in public schools to wear black armbands in protest to the War in Vietnam).⁵³⁶ It came before the Supreme Court developed the public forum doctrine in the mid 1980s.⁵³⁷ Fink's dissertation predated the development of the government speech doctrine.⁵³⁸ It also predated the Supreme Court's decision in *Weisman* in 1993 (holding that the Establishment Clause of the First Amendment prohibits public schools from inviting a cleric to recite a nondenominational prayer at

534. In the cases of *Nurre v. Whitehead*, 520 F. Supp. 2d 1222 (W.D. Wash. 2007), *aff'd* 580 F.3d 1087 (9th Cir. 2009), *McComb v. Crehan*, 320 F. App'x. 507 (9th Cir. 2009), and *Corder v. Lewis Palmer Sch. Dist. No. 98*, 566 F.3d 1219 (10th Cir. 2009), school officials reviewed and censored student speech. Every year one may find instances of student graduation speakers who attempt to evade restrictions on their speech, and usually these restrictions don't involve religious expression. See, e.g., Avi Selk, *A Valedictorian Went Rogue in His Speech. His School Tried to Shut Him down*, WASH. POST (June 20, 2017), https://www.washingtonpost.com/news/education/wp/2017/06/20/a-valedictorian-went-rogue-in-his-final-speech-his-school-tried-to-shut-him-down/?utm_term=.3d935625aaad (video showing student's microphone cut off when he departed from approved speech to criticize the school administration); James Michael Nichols, *Evan Young, Gay Valedictorian Barred from Giving Speech, Finally Gets His Chance*, HUFFINGTON POST (June 3, 2015), http://www.huffingtonpost.com/2015/06/03/gay-valedictorian-speech_n_7502684.html (gay valedictorian not permitted to give speech in which he planned to come out of the closet); Elisa Gootman, *A Valedictorian Loses, Then Regains Her Diploma*, N.Y. TIMES (June 29, 2004), <http://www.nytimes.com/2004/06/29/nyregion/a-valedictorian-loses-then-regains-her-diploma.html> (valedictorian denied her diploma for giving a speech highlighting problems at her school).

535. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633–34 (1943).

536. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512–13 (1969).

537. The U.S. Supreme Court has developed the public forum doctrine in several opinions, the first two of which were *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), and *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788 (1985).

538. The U.S. Supreme Court first implied the doctrine in *Wooley v. Maynard* by acknowledging a legitimate government interest in communicating to the public an official message. 430 U.S. 705, 716 (1977). In *Rust v. Sullivan*, the Supreme Court held doctors paid by the government in a government health program were speaking for the government, so that the government may prohibit them from advising patients on obtaining abortions. 500 U.S. 173, 193 (1991). In *Pleasant Grove City v. Summum*, the Supreme Court held that a municipality was exercising government speech in accepting a privately funded permanent monument in a public park while rejecting another from a different private organization. 555 U.S. 460, 469 (2009). Under the government speech doctrine, the Free Speech clause of the First Amendment prohibits the government from regulating private speech but does not restrict the government when it is speaking for itself. *Id.*

a public school graduation).⁵³⁹ The disturbing reality emerges that if indeed there has been a sea change in graduation ceremonies from greater freedom of student expression to absolute and complete control by school authorities, this change has not been the result of any tradition, but rather the result of the intrusion of the courts upon the discretion of school administrators and officials. The plenary control the courts speak of is not a custom of American education, but rather a creation of the courts.

Perhaps Justice Black in his *Tinker* dissent and Justice Thomas in his *Morse* concurrence were correct to argue that the Court should not usurp the discretion of school officials.⁵⁴⁰ But for a reason that neither of these jurists perceived: That is, the involvement of the courts in the issues of Free Speech and the Establishment Clause in public schools would ultimately diminish the free speech of students by incentivizing a zero-tolerance policy that prohibits all student expression at graduation for reasons that ultimately have little to do with student rights, but a great deal to do with avoiding any liability as school officials clutch ever more tightly to their budgets and their careers.

Also contrary to the traditional notions of student speech at graduation is the vision of public school government speech that Americans United enthusiastically advocated. This vision is, however, the logical outcome of case law, which insists that everything that happens at a public school graduation, including the speech and musical expression of the students, is really the school's speech. Students who have earned the right to ostensibly deliver their own speeches at graduation, but then find this right conditioned on acceptance of school censorship,⁵⁴¹ become, as

539. *Lee v. Weisman*, 505 U.S. 577, 587 (1993).

540. In *Tinker*, Justice Hugo Black issued a dissent in which he disagreed that judges should second-guess the decisions of school officials concerning what student speech to allow:

This case, therefore, wholly without constitutional reasons in my judgment, subjects all the public schools in the country to the whims and caprices of their . . . students . . . I wish, therefore, wholly to disclaim . . . that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students. I dissent.

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 525–26 (Black, J., dissenting). Similarly, in *Morse v. Frederick*, Justice Clarence Thomas argued that the Supreme Court should overrule its holding in *Tinker*.

I join the Court's opinion because it eroded *Tinker*'s hold in the realm of student speech, even though it does so by adding to the patchwork of exceptions to the *Tinker* standard. I think the better approach is to dispense with *Tinker* altogether, and given the opportunity, I would do so.

Morse v. Frederick, 551 U.S. 393, 422 (2007) (Thomas, J., concurring).

541. Under the principal of "unconstitutional conditions," the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech even if he has no entitlement to that benefit." *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)); see also Amicus Brief for National Legal Foundation in Support of Plaintiff-Appellant Supporting Reversal, at 3, *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219 (10th Cir. 2008) (No. 08-1293) 2008 WL 5609517. Justice Kennedy's concern in *Weisman*, that religious conformity should not be the price of attending one's own graduation is a formulation that reflects the unconstitutional conditions doctrine. However, the doctrine may apply with even more force to the situation in which a student who has earned the privilege of delivering a speech or performing at a graduation must waive free speech rights by submitting to the censorship of school authorities.

Justice Alito put it, mere puppets of school officials.⁵⁴² The appropriate disclaimer for any student expression at a public school graduation should then be: "The views expressed have been censored by the school administration and do not necessarily represent the views of the student."⁵⁴³ This is a far more genuine issue of transparency than hiding the title of "Ave Maria" ever could be.

The Supreme Court should rethink its jurisprudence regarding public high school graduations. The courts should take into consideration the deleterious effects of the fear of litigation the case law now inspires. This means the courts ought to provide more guidance regarding violations of Free Speech and the Establishment Clause. On the other hand, the courts might also step back to allow school administrators a bit of the "play-in-the-joints" discretion at graduation recommended by the National School Boards Association,⁵⁴⁴ so that litigation only occurs where school officials allow or perpetrate clear and obvious violations of students' rights at graduation. Certainly, many school administrators will, to some extent, abuse their discretion in limiting student expression, or in permitting religious expression. However, as in the period Fink studied, other administrators will make good decisions balancing student Free Speech with the Establishment Clause so that a freer, more creative culture will return to at least some public high school graduations where administrators no longer labor under the abject fear of being sued, or feel it necessary to become minor tyrants in suppressing student speech. In this way, the public school graduation may once more become a celebration of student learning and creativity and not a government exercise in zero-tolerance, nor an exhibition of the "Ave Maria" effect.⁵⁴⁵

542. *Nurre v. Whitehead*, 559 U.S. 1025, 1028 (2010) (Alito, J., dissenting from denial of certiorari) ("School administrators may not behave like puppeteers who create the illusion that students are engaging in personal expression when in fact the school administration is pulling the strings.").

543. *See* Jonassen, *supra* note 25.

544. *NSBA Brief*, *supra* note 467, at 18.

545. *See Nurre v. Whitehead*, 580 F.3d 1087, 1099 (9th Cir. 2009) (Smith, J., concurring in part and dissenting in part) ("The taking of such unnecessary measures by school administrators will only foster the increasingly sterile and hypersensitive way in which students may express themselves in such fora, and hasten the retrogression of our young into a nation of Philistines, who have little or no understanding of our civic and cultural heritage.").